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Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning

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SOURCES OF FEDERALISM: AN EMPIRICAL ANALYSIS OF THE COURT'S QUEST FOR ORIGINAL MEANING

Peter J. Smith^{*}

A debate continues to rage in the academy and on the U.S. Supreme Court about the propriety of originalism as a methodology of constitutional interpretation. In federalism cases both the majority and the dissent on the current Court appear to have embraced originalism, yet their agreement ends there: The Court has consistently divided 5–4 in such cases. What explains the disagreement among Justices who appear to agree that the original understanding of the Constitution is also its current meaning?

This Article presents the results of a study of citation patterns in federalism cases since 1970 and demonstrates that the Court's current majority in such cases gives substantially more weight than the dissent to Anti-Federalist views. To the extent that the majority relies on Federalist views in establishing the original understanding, it is substantially more likely than the dissent to cite Federalist statements that appear to have been made to allay Anti-Federalist fears about the power of the national government or that (at a minimum) demonstrate more solicitude for state autonomy. Conversely, the dissent is substantially more likely than the majority to cite as evidence of the original understanding the more unabashedly nationalistic views of Federalists; the majority rarely cites such statements as evidence of original meaning, choosing instead to discount them as outside the framing mainstream or to read them narrowly or in a context that renders them more federalistic in nature.

The results of the study have implications for originalism. Although proponents of originalism have defended the approach on the ground that it constrains judges' ability to impose their own views under the guise of constitutional interpretation, the study suggests that judges seeking the original understanding are largely unconstrained in their ability to mold the historical record to serve instrumentalist goals.

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INTRODUCTION

Sometimes, seemingly meaningless quips buried deep in the footnotes of judicial opinions reveal more about judicial methodology than the reasoning in the body of the opinion itself. Consider Justice Scalia's opinion for the Court in *Printz v. United States*,¹ which invalidated several provisions of the Brady Handgun Violence Prevention Act² on the ground that Congress lacked constitutional authority to compel state and local officials to execute federal law.³ Justice Souter, who, like Justice Scalia, based his conclusion on his view of the original understanding of the Constitution, argued in his dissent that both James Madison and Alexander Hamilton had each suggested in various papers of *The Federalist* that Congress would enjoy such power.⁴ The Court disputed Justice Souter's reading, in particular finding it "most implausible that [Madison] . . . believed, but neglected to mention, that" state officials could be subject to such federal commands.⁵ The Court seemed less confident that Hamilton had rejected the view that Justice Souter ascribed to him,⁶ but argued in a footnote that "[e]ven if we agreed with Justice Souter's

1. 521 U.S. 898 (1997).

2. Pub. L. No. 103-159, 107 Stat. 1536 (codified as amended at 18 U.S.C. 922).

3. The Court held that "the Federal Government may not compel the States to enact or administer a federal regulatory program," 521 U.S. at 933, and that the Brady Act's provisions requiring local law enforcement officials "to perform background checks on prospective handgun purchasers plainly runs afoul of that rule." *Id.*

4. *Id.* at 970-76 (Souter, J., dissenting) (discussing THE FEDERALIST NOS. 27, 36 (Alexander Hamilton), NOS. 44, 45 (James Madison)).

5. *Id.* at 915.

6. The Court noted "several obstacles" to Justice Souter's interpretation of the views expressed by Hamilton in *The Federalist* No. 27, and offered a different reading. *Id.* at 911-14. The Court then added: "If it was indeed Hamilton's view that the Federal Government could direct the officers of the States, that view has no clear support in Madison's writings, or as far as we are aware, in text, history, or early commentary elsewhere." *Id.* at 915.

reading of” Hamilton’s writings, they still would not be entitled to “determinative weight.”⁷

Justice Scalia’s explanation for *why* Hamilton’s views would not carry the day is both striking in its candor and telling in its implications for originalism, which accords dispositive weight to the original understanding of the Constitution. He argued that relying so heavily on Hamilton’s views “would be crediting the most expansive view of federal authority ever expressed, and from the pen of the most expansive expositor of federal power.”⁸ Justice Scalia noted that “Hamilton was ‘the most nationalistic of all nationalists in his interpretation of the clauses of our . . . Constitution,’”⁹ and argued that “[t]o choose Hamilton’s view . . . is to turn a blind eye to the fact that it was Madison’s—not Hamilton’s—that prevailed, not only at the Constitutional Convention and in popular sentiment, but in the subsequent struggle to fix the meaning of the Constitution by early congressional practice.”¹⁰

How could the Court in *Printz*—one of the most avowedly originalist decisions of recent years¹¹—dismiss the views of one of the most cited and

7. *Id.* at 915 n.9.

8. *Id.*

9. *Id.* at 915–16 n.9 (quoting CLINTON ROSSITER, *ALEXANDER HAMILTON AND THE CONSTITUTION* 199 (1964)).

10. *Id.* at 916 n.9 (citing ROSSITER, *supra* note 9, at 44–47, 194, 196; 1 RECORDS OF THE FEDERAL CONVENTION 366 (Max Farrand ed.)).

11. The Court noted several times that its objective was to discern the original understanding of the Constitution, *see id.* at 905 (considering early congressional enactments because they “provid[e] contemporaneous and weighty evidence of the Constitution’s meaning” (quoting *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986) (internal quotations omitted))); *id.* at 907 (“These early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions . . .”); *id.* at 910 (“[T]he Government also appeals to other sources we have usually regarded as indicative of the original understanding of the Constitution.”), and Justice Scalia’s opinion relied extensively on *The Federalist* as evidence of that understanding. Justice Scalia cited thirteen different *Federalist* papers, and often quoted from them directly.

Justice Scalia’s opinion was not the only one that followed this mode of inquiry. Justice Stevens framed his dissent largely as a challenge to the Court’s interpretation of the historical record, *see id.* at 954 & n.15 (Stevens, J., dissenting) (“[T]here should be a presumption that if the Framers had actually intended such a [constitutional] rule, at least one of them would have mentioned it.”); and, as suggested above, Justice Souter based his dissent almost entirely on his contrary reading of *The Federalist*, *see id.* at 971–76 (Souter, J., dissenting) (“In deciding these cases, which I have found closer than I had anticipated, it is *The Federalist* that finally determines my position.”). Justice Thomas’s concurring opinion was also avowedly originalist, arguing that the Court should “temper [its] . . . Commerce Clause jurisprudence and return to an interpretation better rooted in the Clause’s original understanding.” *See id.* at 937 (Thomas, J., concurring) (quotations omitted).

influential framers?¹² Justice Scalia's response presumably would track the explanation he gave in his Tanner Lectures:

I will consult the writings of some men who happened to be delegates to the Constitutional Convention—Hamilton's and Madison's writings in *The Federalist*, for example. I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood.¹³

His search for original meaning, in other words, leads him to ask what a reasonable interpreter of the Constitution at the time of the ratification—the “reasonable ratifier,” to use John Manning's phrase¹⁴—would have understood the Constitution to mean. If the reasonable ratifier was, with respect to the question at issue, less “nationalistic” (to use Justice Scalia's term) than Hamilton, then Hamilton's views do not accurately “display how the text of the Constitution was originally understood.”¹⁵

Although this justification for selective reliance on Hamilton's views tends to allay one's initial concerns about an originalist Court's discounting of what is otherwise standard originalist material, it is ultimately unsatisfying;¹⁶ indeed, Justice Scalia's rationale¹⁷ raises several important and ultimately intractable questions. Perhaps the most obvious is this: How can the Court confidently discern the views of the metaphysical reasonable ratifier¹⁸ when the bulk of the *evidence* for the reasonable ratifier's views is drawn from the writings of the “intelligent and informed people of the

12. Indeed, the same five Justices who constituted the majority in *Printz* joined in the majority opinion in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), which referred to Alexander Hamilton, along with John Marshall and James Madison, as “influential Framers,” *id.* at 70. I discuss below (at great length) the Rehnquist Court's treatment of Hamilton and other prominent voices from the ratification period.

13. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 38 (Amy Gutmann et al. eds., 1997).

14. John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1339 (1998).

15. Scalia, *supra* note 13, at 38.

16. The same argument applies to selective reliance on any other framer's views. For example, the Court has rejected Madison's apparent view of the scope of Congress's spending power as unduly narrow, accepting instead Hamilton's more expansive view. See *United States v. Butler*, 297 U.S. 1, 65–67 (1936); *Helvering v. Davis*, 301 U.S. 619, 640–41 (1937).

17. A majority of the Court appears to have accepted Justice Scalia's view in federalism cases. See *infra* notes 285–310 and accompanying text.

18. Most originalists (including Justice Scalia) apply an objective standard of interpretation. See Scalia, *supra* note 13, at 38 (describing search for “objective meaning”); see also Manning, *supra* note 14, at 1339.

time,”¹⁹ only some of which represent, depending on the issue, accurate evidence of the original understanding? Merely stating the question highlights the circular nature of the inquiry.²⁰

If we could confidently say, as a historical matter, that the published views of one or several participants in the battle over ratification simply did not accord with the conventional understanding of the Constitution’s meaning at the time—if, for example, a member of the Virginia ratifying convention had argued that the “Congress” referred to in the Constitution was in fact the British Parliament—then it would make sense systematically to discount that person’s views about the meaning of the Constitution.²¹ But neither side in the Court’s current debate over the Constitution’s allocation of authority between the federal government and the states has rested its arguments about original understanding on the rantings of a ratification-era lunatic. Instead, in the Court’s most recent federalism cases, the majority of five Justices who are generally sympathetic to claims of state autonomy²² have canvassed the same materials on which the

19. Scalia, *supra* note 13, at 38.

20. See, e.g., Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1639 (2000) (noting “that original meaning and intent are frequently hard to separate, especially where the same sorts of evidence would be used to divine both”).

21. That is, it would make sense if one accepts originalism as the appropriate method of constitutional interpretation. As I discuss below, see *infra* notes 58–77 and accompanying text, there are several compelling critiques of originalism. This Article seeks to buttress those critiques by examining how members of the Court have deployed this interpretive methodology.

22. Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, and Thomas have typically voted to uphold claims of state sovereignty, and Justices Stevens, Souter, Ginsburg, and Breyer have generally dissented. Indeed, federalism cases decided since Justice Breyer’s appointment to the Court have most often produced the identical line-up in 5–4 decisions against the challenged assertion of federal power, see, e.g., *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002); *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *United States v. Lopez*, 514 U.S. 549 (1995), although there have been some notable exceptions, see, e.g., *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (Chief Justice Rehnquist and Justice O’Connor joining Justices Stevens, Souter, Ginsburg, and Breyer in holding that the Family and Medical Leave Act validly abrogates the states’ sovereign immunity); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (Justice Kennedy joining Justices Stevens, Souter, Ginsburg, and Breyer in holding that the states lack power to restrict the number of terms federal representatives may serve).

The pattern of 5–4 decisions was substantially the same during the first eight years of William H. Rehnquist’s tenure as Chief Justice. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468 (1987). The only notable exceptions before Justice Breyer’s appointment were *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), in which Justice White cryptically joined a plurality of four Justices to hold that Congress had authority pursuant to the Commerce Clause to abrogate the states’ sovereign immunity (later

dissenters have relied and come to different conclusions about the original understanding. Those five Justices have regularly sided with the states in federalism disputes, whereas the four consistent dissenters have sided with the federal government.

It is not unusual for historians to draw sharply differing conclusions from the same body of materials,²³ and originalism is, after all, “a task sometimes better suited to the historian than the lawyer.”²⁴ In recent federalism decisions, however, the majority has so robustly opposed federal power that some commentators have suggested that the majority has, in effect, accepted the views of the framing-era *Anti-Federalists*, who opposed ratification of the Constitution largely on the ground that it would give too much power to the federal government.²⁵ Although these suggestions have been based less on the Court’s interpretive methodology than on the Court’s general tendency to side with the states in federalism disputes, Justice Scalia’s discounting in *Printz* of Hamilton’s views suggests that the

overruled in *Seminole Tribe*, 517 U.S. at 66), and *New York v. United States*, 505 U.S. 144 (1992), in which Justice Souter added a sixth vote in favor of the state’s claim.

23. Compare EDMUND S. MORGAN, *THE BIRTH OF THE REPUBLIC, 1763–89* (1956) (arguing that the American Revolution and the lead-up to the Constitution were driven by a belief in the virtues of republican government), with CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (Transaction Publishers 1998) (1913) (arguing that the Constitution was the product of economic self-interest).

24. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 857 (1989).

25. See, e.g., Michael C. Dorf, *No Federalists Here: Anti-Federalism and Nationalism on the Rehnquist Court*, 31 RUTGERS L.J. 741, 741 (2000) (referring to the “Court’s defenders of state sovereignty” as “Anti-Federalists”); Daniel A. Farber, *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 NOTRE DAME L. REV. 1133, 1135 (2000) (“Rather than echoing Alexander Hamilton, James Madison, and John Marshall, the Court’s language often seems more reminiscent of the views of their opponents.”); John E. Nowak, *The Gang of Five & the Second Coming of an Anti-Reconstruction Supreme Court*, 75 NOTRE DAME L. REV. 1091, 1093 (2000) (stating that the Court’s recent state sovereign immunity decisions “reflect Anti-Reconstruction, and to some extent Anti-Federalist, ‘philosophy’”); Peter M. Shane, *Federalism’s “Old Deal”: What’s Right and Wrong With Conservative Judicial Activism*, 45 VILL. L. REV. 201, 205 (2000) (“[T]he late Eighteenth Century political thought most consistent with Rehnquist’s view of state sovereignty belonged to the Anti-Federalists, for whom the Constitution was a significant political defeat precisely because it did not embody their political philosophy.”); Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 138 n.137 (1999) (“Some have referred to [*Alden v. Maine*, *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*] . . . as the ‘federalism trio,’ though perhaps the appellation ‘antifederalist trio’ would be more appropriate.”); Louise Weinberg, *Of Sovereignty and Union: The Legends of Alden*, 76 NOTRE DAME L. REV. 1113, 1167–69 (2001) (arguing that *Alden v. Maine* is based on the views of “our Anti-federalist founders”); see also Jeff Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317, 1369 (1982) (“Justice Rehnquist’s ‘Framers’ sound superficially like Jefferson, remarkably like the opponents of the Constitution, and not at all like the statesmen who created the Constitution and battled successfully for its ratification in the thirteen state conventions.”).

Justices who have led the federalism revival may be justifying their federalism decisions on the founding-era views of individuals who were avowed opponents of the Constitution's ratification.

The Court's dismissal of Hamilton was unusual in its directness, but a careful study of the Court's recent federalism decisions demonstrates that it was hardly anomalous. For this Article, I reviewed every federalism decision since 1970 (and hundreds of pre-1970 decisions) to determine whether there is a difference between the founding-era views that the current federalism majority cites and those that the current dissenters cite. I divided citations to founding-era views into three general categories: nationalistic statements by Federalists and other proponents of the Constitution; more tempered, federalistic statements by Federalists offered as responses to Anti-Federalist arguments about the Constitution's meaning; and statements by Anti-Federalists about the Constitution's meaning.

The study reveals that in federalism cases, the Justices in the majority are substantially more likely than the dissenters to cite as authoritative evidence of the Constitution's original meaning the concerns expressed by Anti-Federalists and others during the ratification period who strongly *opposed* ratification of the Constitution. Moreover, to the extent that the current majority relies on the views of Federalists and other founding-era *proponents* of the Constitution, the majority is substantially more likely than the current dissenters to cite statements intended to address and allay Anti-Federalist concerns. Finally, the dissenters are significantly more likely than the majority to cite as authoritative evidence of the original understanding the unabashedly nationalistic statements of some of the Constitution's supporters.

The aim of this survey—and this Article—is not to demonstrate which view of the original understanding is correct; rather, its goal is to illustrate that the manner in which the members of the Court have deployed originalism as an interpretive methodology undercuts one of originalism's principal justifications to a more serious degree than that conceded by the methodology's strongest proponents. As Justice Scalia explains it, originalism is justified in part because it is more likely than other methods of constitutional interpretation to avoid the “main danger in judicial interpretation . . . —that the judges will mistake their own predilections for the law.”²⁶ This is so, he argues, because originalism “establishes a historical

26. Scalia, *supra* note 24, at 863; see also Scalia, *supra* note 13, at 41–47.

criterion that is conceptually quite separate from the preferences of the judge himself.”²⁷ Chief Justice Rehnquist has made the same argument.²⁸

Justice Scalia acknowledges that the “practical defect[] of originalism” is that “it may indeed be unrealistic to have substantial confidence that judges and lawyers will find the correct historical answer to” all questions of original meaning.²⁹ He recognizes that “[t]here is plenty of room for disagreement as to what original meaning was, and even more as to how that original meaning applies to the situation before the court.”³⁰ This concession seems substantially understated when applied to the recent federalism decisions, which have revealed such starkly different views of the Constitution that the regular dissenters have staunchly refused to accept as precedent an increasing number of decisions.³¹ The competing views on the Court of the original understanding are so fundamentally different—and the difference between the sources that are offered to justify the competing views so demonstrable—that one must wonder whether the Justices have been able to distinguish their own preferences about distribution of authority in a federal system from those of the reasonable ratifier. Ironically, this problem has been brought into stark relief by the practice of the Justices on *both* sides of the federalism debate to treat the original understanding as dispositive, at least in federalism disputes. If both the majority and the dissent seek to discern the original meaning of the

27. Scalia, *supra* note 24, at 864.

28. Then-Justice Rehnquist argued:

Beyond the Constitution and the laws in our society, there simply is no basis other than the individual conscience of the citizen that may serve as a platform for the launching of moral judgments. There is no conceivable way in which I can logically demonstrate to you that the judgments of my conscience are superior to the judgments of your conscience, and vice versa. Many of us necessarily feel strongly and deeply about our own moral judgments, but they remain only personal moral judgments until in some way given the sanction of law.

William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704 (1976). The only way to avoid this “civil war of consciences,” Powell, *supra* note 25, at 1319, he argued, is to “derive a . . . ‘set of values . . . from the language and intent of the framers’ by ‘detached and objective’ interpretation.” Rehnquist, *supra*, at 695.

29. Scalia, *supra* note 24, at 863.

30. Scalia, *supra* note 13, at 45.

31. See, e.g., *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 699 (1999) (Breyer, J., dissenting) (“I am not yet ready to adhere to the proposition of law set forth in *Seminole Tribe*”); *Alden v. Maine*, 527 U.S. 706, 814 (1999) (Souter, J., dissenting) (“I expect the Court’s late essay into immunity doctrine will prove the equal of its earlier experiment in *laissez-faire*, the one being as unrealistic as the other, as indefensible, and probably as fleeting.”); cf. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting) (“I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.”).

Constitution, but in so doing choose to privilege starkly different founding-era views, then it is natural to ask whether the problem lies not with their respective success in revealing the original meaning, but rather with originalism itself.

The ultimate problem lies in the difficulty of discerning objective meaning in a broadly worded document that attempted to strike compromises among competing interests, the ratification of which invited proponents and opponents alike to urge particular constructions of the document that would serve their immediate ends.³² Many argue that the proper resolution for the Court's current federalism debate is for the Court to accept the "correct" account of the original understanding.³³ My study of the Court's treatment of the historical materials suggests, however, that the defect lies in originalism itself. The ability of the current Justices to find support in the historical record for sharply conflicting views of the original understanding demonstrates that one of the principal defenses of originalism—that its objective of fixed, historical meaning constrains the ability of judges to impose their own views under the guise of constitutional interpretation—is overstated at best and illusory at worst.

This Article proceeds in four parts. Part I provides an overview of originalism as an interpretive methodology and its embrace by both the current majority and dissent as the appropriate means of constitutional interpretation in federalism cases. Part II.A describes the Constitution's drafting and ratification with particular attention to the debates between Federalists and Anti-Federalists in order to provide the background for consideration of the Court's treatment of the historical materials; Part II.B notes some of the difficulties of finding original meaning given the complex history of the ratification.

Part III presents the findings of the study, which illustrate the demonstrable difference between the founding-era views cited by the majority and by the dissent. Finally, Part IV addresses the implications for originalism of this systematic disagreement.

32. See JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 10 (1996).

33. See, e.g., Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors In Search of a Theory*, 75 NOTRE DAME L. REV. 1011 (2000); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1561 (2002).

I. ORIGINALISM AS A METHOD OF CONSTITUTIONAL INTERPRETATION

Originalism is a theory of constitutional interpretation that assigns dispositive weight to the original understanding of the Constitution or the constitutional provision at issue. Originalism thus requires that a constitutional provision be interpreted as it was understood when it was drafted and ratified, not according to the meaning that subsequent generations have ascribed to it. Originalism therefore requires reference to framing-era understandings to determine the meaning of the Constitution today. Stated another way, originalism holds that the meaning of the Constitution does not change; its present meaning is its framing-era meaning.

This description of originalism is deceptively simple. As the most prominent adherents of the view concede, “[t]here is plenty of room for disagreement as to what original meaning was, and even more as to how that original meaning applies to the situation before the court.”³⁴ Over the years proponents of what can generically be called originalism have disagreed over whether an originalist court’s goal should be to ascertain the original meaning of the text, to determine the intent of those who framed or drafted the provision, to reveal the original understanding of the provision by some other actors in the process, or to infer the original values that led to the adoption of the provision.³⁵ In recent years, a consensus has begun to develop that the appropriate objective is to discern the original meaning of the text, determined by reference to the understanding of the provision at the time of its adoption.³⁶

Even among professed originalists who agree that the original understanding is the key to determining original meaning, there is disagreement over *whose* understanding matters. Some have argued that

34. Scalia, *supra* note 13, at 45; see also ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 163 (1990) (acknowledging that the original understanding is not always easy to discern, and that “two judges equally devoted to the original purpose may disagree about the reach or application of the principle at stake and so arrive at different results, but that in no way distinguishes the task from the difficulties of applying any other legal writing”).

35. See Richard S. Kay, “Originalist” Values and Constitutional Interpretation, 19 HARV. J.L. & PUB. POL’Y 335, 336–40 (1996).

36. See, e.g., Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 681–82 (1991) (distinguishing between “sophisticated” and “unsophisticated” versions of originalism); Scalia, *supra* note 13, at 38 (“What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”).

the understanding of the framers themselves is authoritative;³⁷ others have maintained that the understanding of those who voted in state ratification conventions is dispositive;³⁸ still others have focused on the understanding of average citizens at the time of the framing.³⁹ To complicate matters, some commentators have maintained that although the understanding of the average citizen is authoritative, evidence of ratifier⁴⁰ or framer⁴¹ understanding generally suffices to demonstrate original meaning.⁴² Assuming agreement on whose understanding we should seek, the main

37. See, e.g., RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987); U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL, *ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK* 9 (1987).

38. See Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77 (1988) (arguing that the framers believed that ratifiers' intent, but not framers' intent, would matter to determining the original understanding); Manning, *supra* note 14, at 1339 (reasonable ratifier); Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507, 512 (1988) (ratifiers).

39. See Perry, *supra* note 36, at 677 ("It is the meaning to, or the understanding of, those, the enfranchised, in whom sovereignty ultimately resides and on whose behalf the ratifiers acted—those the ratifiers 'represented'—that should matter."); Scalia, *supra* note 13, at 3, 23–25.

40. See Perry, *supra* note 36, at 677 (arguing that because what the ratifiers "understood a proposed constitutional provision to mean is substantially what the public they represented understood, . . . the ratifiers' understanding can be taken, at least provisionally, as an adequate approximation of the original public understanding"); see also BORK, *supra* note 34, at 144 ("[W]hat the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean.").

41. See Scalia, *supra* note 13, at 38 (justifying his willingness to consult framers' writings on the ground that "their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood"); see also BORK, *supra* note 34, at 144 (arguing that the framers' views "are merely evidence of what informed public men of the time thought the words of the Constitution meant").

42. As Robert Clinton has explained, although originalism is "an inquiry that purports to be objective because it focuses on the meaning of language as understood when the constitutional document was drafted," in its application it

contains considerable subjective elements. Ultimately, this approach does not ask simply what the constitutional words mean; it asks what they meant to a particular universe of persons at the time they were propounded. For the original constitutional document, that interpretive universe may include the members of the Philadelphia Convention, the members of the state ratification conventions, or the "We the People of the United States" referred to in the preamble. Whatever the relevant interpretive constituency, however, the inquiry nevertheless is how *they* understood the language rather than what the language connotes today.

Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1181 n.4 (1987). Even assuming agreement on whose understanding is relevant, a court must be cognizant of the fact that it is reading not only text but political argumentation from a different period in our history. Accordingly, some commentators have discussed the need to understand the "political grammar" and "interpretive conventions" of the relevant time period. See Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003); H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. REV. 949 (1993).

evidence of that understanding—the historical materials from the debates over the framing and ratification of the Constitution and its subsequent amendments—may at best be inaccurate and at worst “have been compromised—perhaps fatally—by the editorial interventions of hirelings and partisans.”⁴³

Once one overcomes these difficulties, however, the principal conventional defenses of originalism are relatively straightforward.⁴⁴ Adherents contend that originalism is the only method of constitutional interpretation that is consistent with the notion that the Constitution is a form of law, albeit a special kind of law. Like any other law, the Constitution “has a fixed meaning ascertainable through the usual devices familiar to those learned in the law.”⁴⁵ “When we speak of ‘law,’” Judge Bork has argued, “we ordinarily refer to a rule that we have no right to change except through prescribed procedures,” such as those provided in Article V of the Constitution. This view of law “assumes that the rule has a [fixed] meaning independent of our own desires.”⁴⁶

As Michael McConnell has explained, “[i]f the Constitution is authoritative because the people of 1787 had an original right to establish a government for themselves and their posterity, the words they wrote should be interpreted—to the best of our ability—as they meant them.”⁴⁷ If the Constitution does not mean what they thought it meant, he argued, but rather “is authoritative only to the extent that it accords with our independent judgments about political morality and structure, then the Constitution” would not be law in any meaningful sense, but instead would be simply “a makeweight.”⁴⁸ Judge Easterbrook made the same point with reference to contract theory: “[T]he Constitution was designed and approved like a contract,” and “contractarian views imply originalist . . . interpretation by the judicial branch.”⁴⁹

43. James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 2, 13–24 (1986).

44. See, e.g., Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 899 (2003) (summarizing defenses of originalism).

45. Scalia, *supra* note 24, at 854; see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 3 (1980).

46. BORK, *supra* note 34, at 143.

47. Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1132 (1998).

48. *Id.* at 1129.

49. Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1121 (1998); see also Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613 (1999); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1788 (1997).

Proponents of originalism further contend that democratic political theory requires that the Constitution be interpreted according to its original meaning.⁵⁰ This defense actually embraces two points. The first is that if “[a]ll power stems from the sovereign people, and the authority of the Constitution comes from their act of sovereign will in creating it,” then “[i]t follows that the Constitution should be interpreted in accordance with their understanding.”⁵¹ In other words, it would be unfaithful to the legitimately and democratically expressed aspirations of the founding generation to interpret the Constitution—the expression of those democratic aspirations—in a manner inconsistent with the founding generation’s understanding. The second is that originalism is more faithful to *current* expressions of majority will through democratic processes. Approaches other than originalism, originalists contend, inevitably seek constitutional meaning in evolving or current values: As Justice Scalia has argued, a “democratic system does not, by and large, need constitutional guarantees to insure that its laws will reflect ‘current values.’ Elections take care of that quite well.”⁵² With its “attempt to adhere to the principles actually laid down in the historic Constitution,” adoption of the originalist methodology “will mean that entire ranges of problems and issues are placed off-limits for judges,” who are not elected, at least at the federal level.⁵³

Originalists also argue that the methodology constrains the ability of judges to impose their own views under the guise of constitutional interpretation. Justice Scalia has argued that the “main danger in judicial interpretation . . . is that the judges will mistake their own predilections for the law,” and that nonoriginalism, “which under one or another formulation invokes ‘fundamental values’ as the touchstone of constitutionality, plays precisely to this weakness.”⁵⁴ Proponents concede that often it is difficult to achieve consensus on what the original understanding was,⁵⁵ but they argue that “the practical defects of originalism are defects more appropriate for the task at hand—that is, less likely to

50. See BORK, *supra* note 34, at 143 (“[O]nly the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy.”)

51. McConnell, *supra* note 47, at 1132.

52. Scalia, *supra* note 24, at 862.

53. BORK, *supra* note 34, at 163; accord Scalia, *supra* note 24, at 862 (“[O]riginalism seems to me more compatible with the nature and purpose of a Constitution in a democratic system.”).

54. Scalia, *supra* note 24, at 863.

55. See *id.*; BORK, *supra* note 34, at 163 (acknowledging that “two judges equally devoted to the original purpose may disagree about the reach or application of the principle at stake and so arrive at different results, but that in no way distinguishes the task from the difficulties of applying any other legal writing.”).

aggravate [this] most significant weakness of the system of judicial review.”⁵⁶ Although there is “plenty of room for disagreement as to what original meaning was, and even more as to how that original meaning applies to the situation before the court . . . [,] the originalist at least knows what he is looking for: the original meaning of the text,” not some broader and more amorphous notion grounded in the judge’s own views of justice and morality.⁵⁷

Originalism nevertheless has more than its share of critics.⁵⁸ One frequent criticism of originalism is methodological. Critics of modern originalism observed that “the nature of historical materials and the uses judges can make of them create serious problems.”⁵⁹ Such historical materials are often “incomplete, inaccurate, or conflicting.”⁶⁰ More seriously, judges are not necessarily well equipped to engage in historical inquiry, and they might slant the history to serve instrumentalist goals.⁶¹ Even if these problems associated with the use of history are not insurmountable, some critics contend that the framers themselves might not have thought that the Constitution would be interpreted by subsequent generations according to the framers’ original understanding.⁶² According

56. Scalia, *supra* note 24 at 863.

57. Scalia, *supra* note 13, at 45. Justice Scalia has even acknowledged that originalism cannot completely “inoculate[] against willfulness”; but he finds originalism preferable because “unlike aspirationism[,] . . . it does not cater to it.” Antonin Scalia, *Response, in A MATTER OF INTERPRETATION*, *supra* note 13, at 140.

58. Much of the early criticism of originalism focused on the pitfalls of ascertaining original intent, as opposed to original meaning. See, e.g., LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION* (1988); JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* (1990); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980). More sophisticated versions of originalism focus not on subjective intentions but on objective meaning. See Perry, *supra* note 36, 681–82. I focus on responses to those approaches.

59. Stephen R. Munzer & James W. Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1032 (1977).

60. *Id.*

61. See *id.* at 1033; CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 25 (1969); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13, 156; Paul L. Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64, 77 (1963); see also Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 470–71 (1981) (arguing that originalist claims to neutrality are pretense because the choice of one mode of interpretation over another is itself a political decision).

62. After “examin[ing] the historical validity of the claim that the ‘interpretive intention’ informing the Constitution was an expectation that future interpreters would seek the instrument’s meaning in the intentions of the delegates to the 1787 Constitutional Convention in Philadelphia,” H. Jefferson Powell concluded that “the original intentionalism was in fact a form of structural interpretation. To the extent that constitutional interpreters considered historical evidence to have any interpretive value, what they deemed relevant was evidence of the

to this view, recourse to the framing-era understanding tends to refute originalism.⁶³

Another frequent attack on originalism is that it is ultimately indeterminate. Because the participants in the original debates over the drafting and ratification of the Constitution and its amendments for the most part waged their battles over generalities and broad principles, it is the rare dispute today that can find a direct answer in the historical record in which originalists seek the original understanding.⁶⁴ Stated another way, we might be able to ascertain the original understanding with respect to questions of a high order of generality, but we cannot expect the same with respect to the particularized questions of constitutional law that are bound to arise today.⁶⁵

A more fundamental attack on originalism focuses on the doctrine's "dead hand" problem.⁶⁶ "Probably the most prevalent argument against originalism is that it is too static, and thereby disregards the need to keep the Constitution up to date with changing times."⁶⁷ Under this view, "a

proceedings of the state ratifying conventions, not the intent of the framers." H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 886, 888 (1985) (footnotes omitted). Powell's argument was devastating to those who claimed that the *intent* of the framers should be given dispositive weight, but it did not meaningfully undermine the view that the *original understanding* is authoritative.

63. John Hart Ely offered a variation on this theme by arguing that some provisions of the Constitution—particularly the 9th Amendment and the Privileges or Immunities Clause of the 14th Amendment—themselves require judges to go beyond the understanding of those provisions' framers and ratifiers. See ELY, *supra* note 45, at 28.

64. See RAKOVE, *supra* note 32, at 10 ("With its pressing ambition to find determinate meanings at a fixed moment, the strict theory of originalism cannot capture everything that was dynamic and creative, and thus uncertain and problematic, in the constitutional experiments of the Revolutionary era . . ."); Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 398 (1989) ("History can illustrate what has happened . . . But, history cannot, alas, tell us how to rule ourselves. The texts of the debates over the Constitution cannot reveal, as a Delphic oracle might, what the intentions of the framers were for the specific policy questions that trouble our generation.").

65. See, e.g., Ronald Dworkin, *Comment*, in A MATTER OF INTERPRETATION, *supra* note 13, at 115, 122 ("[K]ey constitutional provisions, as a matter of their original meaning, set out abstract principles rather than concrete or dated rules."). Professor Dworkin also makes this point by distinguishing between what he calls "semantic originalism" and "expectation originalism." The former refers to what some officials "intended to say" in enacting the language they used, and the latter refers to what they intended—or expected or hoped—would be the *consequences* of their saying it. *Id.* at 119 (emphasis added). It is appropriate, he says, to consider the former, but not the latter. Cf. Perry, *supra* note 36, at 704–05 ("[I]f a practice violates a principle established by the ratifiers, the practice is unconstitutional even if the ratifiers would or might have resolved the issue differently.").

66. See generally Easterbrook, *supra* note 49, at 1119; McConnell, *supra* note 47; Jed Rubenfeld, *The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085 (1998).

67. Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1095 (1989).

constitutional system that makes formal amendments very difficult and does not allow for gradual change through interpretation is likely to become rigid and out-of-date,”⁶⁸ thus threatening to “make the Constitution itself unworkable.”⁶⁹ This critique goes beyond arguing that strict adherence to the original understanding requires abandonment of large parts of current constitutional doctrine;⁷⁰ it is also instrumentalist, premised on the theory that because some originalist conclusions will be “unappealing” today, they should be ignored.⁷¹ Paul Brest attempted to buttress this claim by arguing that “[t]he drafting, adopting, or amending of the Constitution may itself have suffered from defects of democratic process which detract from its moral claims.”⁷²

Recognizing the force of both the defenses and criticisms of originalism, several commentators have attempted to accommodate or reconcile originalism and nonoriginalism. One ambitious effort has been Lawrence Lessig’s work on fidelity and translation.⁷³ Lessig argued that “[w]hile originalists sometimes say that we must apply the principles of the Framers and Ratifiers to the circumstances of today, they more often behave as if the question were simply (and always), ‘How would the originals have answered this question then?’”⁷⁴ This approach fails, he argued, because “although sensitive to the effects of context upon meaning in the *original* context, it is blind to the effects of context upon the *application* [of] meaning in the *application* context.”⁷⁵ The better approach, he suggested, is fidelity through translation, which aims to “preserve original meaning, not just *in the original context* but *as applied in the current context*.”⁷⁶ Many self-

68. Munzer & Nickel, *supra* note 59, at 1032.

69. Farber, *supra* note 67, at 1095.

70. See PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11–22 (1991); Dorf, *supra* note 49, at 1788; Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 710–714 (1975); see also Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 227 (1988) (“Most observers agree that a substantial portion of constitutional law is only tenuously connected to the Constitution of 1787–89, as amended.”).

71. Munzer & Nickel, *supra* note 59, at 1033.

72. Brest, *supra* note 58, at 230. For direct responses to the principal critiques of originalism, see Kay, *supra* note 70.

73. See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) [hereinafter Lessig, *Fidelity*]; Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995).

74. Lessig, *Fidelity*, *supra* note 73, at 1171 (footnotes omitted). Lessig refers to this approach as “one-step” fidelity.

75. *Id.* at 1189.

76. *Id.*; see also BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); Clinton, *supra* note 42, at 1278–79 (arguing that “[e]xtraconstitutional interpretation [sometimes]

described originalists, including Justice Scalia, have on occasion followed this approach.⁷⁷

“The debate over originalism is almost as old as our current constitutional Union.”⁷⁸ From the period immediately following ratification through the mid-nineteenth century, originalism was the principal, although not exclusive, mode of constitutional interpretation. “The Court’s very early constitutional opinions reflected an intimate knowledge of the Framers’ design because the Justices’ own memories bridged the temporal distance between the Founding and the case at hand”;⁷⁹ indeed, Chief Justice John Marshall had played a crucial role at the Virginia ratification convention. Originalism did not formally come under attack until the Civil War,⁸⁰ which precipitated the ratification of constitutional amendments that seemed to alter substantially the original balance between federal and state authority.⁸¹ The notion that the Constitution’s meaning could evolve competed with originalism for the Court’s devotion during the period between Reconstruction and the New Deal.⁸² After the New Deal, the Warren Court was alternately accused of ignoring the original meaning of the Constitution⁸³ and of relying on but distorting it.⁸⁴ The Warren

facilitates evolution at a minimal cost to constitutional stability,” and that “interpretations of the document that are fundamentally at odds with the historic meaning of those who drafted it . . . ultimately undermine societal faith in constitutional governance and judicial review, suggesting that in appropriate cases the demonstrated original understandings of the Constitution must be controlling”); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 6–7 (1998) (“True fidelity to the Constitution requires that we be faithful to what history reveals as this generation’s deepest, most enduring commitments, not just those of the founding generation.”); cf. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003) (arguing that theories of interpretation should be informed by the “institutional capacities” of the interpreter and the “dynamic effects” of the interpretation).

77. See, e.g., *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a “search” within the meaning of the Fourth Amendment); *id.* at 33–34 (“It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.”); *id.* at 40 (“[W]e must take the long view, from the original meaning of the Fourth Amendment forward.”).

78. Clinton, *supra* note 42, at 1180.

79. Friedman & Smith, *supra* note 76, at 11.

80. See SYDNEY GEORGE FISHER, *THE TRIAL OF THE CONSTITUTION* 55 (1862). The purported originalism of the decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), could not have helped the cause of originalism.

81. See CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* 150 (1890).

82. Compare *Hammer v. Dagenhart*, 247 U.S. 251 (1918), and *United States v. Butler*, 297 U.S. 1 (1936), and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (originalist), with *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934), and *Lochner v. New York*, 198 U.S. 45 (1905) (nonoriginalist).

83. See *Rehnquist*, *supra* note 28, at 702–03.

Court's perceived excesses led to the rise of the modern originalists, and the debate over originalism dominated not only the academic literature but also political debates over judicial nominations in the 1980s.⁸⁵

The debate over originalism continues in the academy, but on the Court the originalists have prevailed, at least in federalism cases. The *Printz* decision is not unusual in the degree to which the debate between the majority and the dissent focused on the original understanding.⁸⁶ Dissenting Justices have from time to time suggested other methods of identifying the boundaries between federal and state power,⁸⁷ but on the whole, the debate in the Court's most recent federalism cases has been waged on originalist terms.

What, then, explains the persistent disagreement in federalism cases between the majority and the dissent? It is no great revelation to suggest that the majority and the dissent have profoundly different views of the original understanding of federalism. What I demonstrate below is that in their respective attempts to discern the original understanding, the majority and dissenting Justices consistently rely on different—indeed, conflicting—views from the framing era. In order to appreciate this, it is necessary first to have an understanding of those conflicting views. Therefore, before providing the results of the study and offering some thoughts about the study's implications for originalism, I provide a brief historical overview of the drafting and ratification of the Constitution. Sadly, it is not possible to provide a suitably nuanced and thorough account of the drafting and ratification of the Constitution in a discussion that, like this one, is necessarily brief; for such a treatment, the reader must look elsewhere.⁸⁸

II. UNDERSTANDING THE ORIGINAL UNDERSTANDING

A. Federalists and Anti-Federalists

Broadly speaking, the drafting of the Constitution and the subsequent battle over its ratification created two opposing camps: the Federalists and

84. See Kelly, *supra* note 61, at 136.

85. See BORK, *supra* note 34, at 295–321.

86. See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999); *id.* at 760–814 (Souter, J., dissenting); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *id.* at 76–100 (Stevens, J., dissenting); *id.* at 100–85 (Souter, J., dissenting); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *id.* at 845–926 (Thomas, J., dissenting).

87. See, e.g., *Printz v. United States*, 521 U.S. 898, 976–77 (1997) (Breyer, J., dissenting) (discussing European views of federalism).

88. For a delightfully nuanced account, see RAKOVE, *supra* note 32.

the Anti-Federalists.⁸⁹ Of course, to divide neatly into two camps those from the founding era who had strong views about the Constitution is to oversimplify history. Some of the Federalists, for example, wanted to abolish the states,⁹⁰ while others believed that the proposed Constitution's national government was too strong and should be limited in authority by subsequent amendment.⁹¹ Likewise, some Anti-Federalists agreed that the Articles of Confederation should be reformed to give Congress more authority,⁹² while others feared any further consolidation of authority. Although it is difficult to generalize at the margins, the principal question that reliably divided the Federalists and the Anti-Federalists was whether to adopt the new Constitution: the Federalists supported ratification, the Anti-Federalists opposed it.

The Anti-Federalists have come to be defined more by what they were *against* than what they were *for*; and they were “*against* the Constitution.”⁹³ However, “[b]y definition, an Anti-federalist was anyone who opposed the ratification of the Constitution, and the word therefore included some who would have been satisfied with a few changes in the new plan and those who would not accept it under any conditions.”⁹⁴

Although the Federalists and the Anti-Federalists are known principally for their efforts for and against the ratification of the Constitution, their respective views crystallized some years earlier. The project of creating a new Constitution, after all, was largely a reaction to the palpable defects of the Articles of Confederation. Under the Articles, Congress did not have a general power of taxation; instead, to raise revenue it had to requisition funds from the states, whose duty of compliance merely was one of good faith. Congress also lacked the power to regulate commerce among the states. And although the power to enter treaties and to “determin[e] on peace and war” were committed to “the United States,

89. The label given to the Anti-Federalists in the literature has not been uniform. Herbert Storing explained: “‘Anti-Federalist’ balances the positive and negative sides by giving the group (or the position) a proper name, while still emphasizing its character as opposition. The typographically convenient ‘Antifederalist,’ now generally in favor, suggests more cohesion than actually existed, while ‘anti-Federalist’ suggests a merely negative, dependent unity.” HERBERT J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* 79 n.6 (1981). Like Professor Storing, this Article refers to the group as the “Anti-Federalists.”

90. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 525 (1969).

91. See JACKSON TURNER MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 1781–1788*, at 119 (1961).

92. See STORING, *supra* note 89, at 24–25.

93. *Id.* at 5.

94. MAIN, *supra* note 91, at 119.

in Congress assembled,”⁹⁵ Congress’s power to conduct foreign affairs was seriously impaired by its lack of direct authority over the states.⁹⁶ There is serious debate over whether the states under the Confederation were truly sovereign and independent,⁹⁷ but there is little doubt that under the Articles Congress was largely impotent to accomplish the shared objectives of the Confederacy.

Before the idea of replacing the Articles with a charter that gave more power to the national government gained currency, Congress sought to address some of the defects of the Articles and, in so doing, to find a cure for the substantial debt with which it was saddled. Shortly before the Articles had even taken effect, Congress proposed an amendment authorizing it to impose an impost on imported goods to raise revenue. When that measure failed to achieve unanimous support among the states, Congress again proposed an impost, this time as part of a compromise package that included inducements for the unwilling states.⁹⁸ Although Congress desperately needed a means other than requisition for raising revenue in order to conduct the business of the confederacy, the larger import of the proposal was not lost on supporters of the general allocation of authority under the Articles. “The immediate effect of the impost would have been to confer a limited power of taxation upon Congress.”⁹⁹ Not too many years before, the colonists had fought a revolution over perceived

95. ARTS. OF CONFEDERATION art. IX, cl. 2 (1781).

96. Several states attempted to carry on their own diplomatic relations with foreign nations, even though such actions were prohibited by the Articles. See WOOD, *supra* note 90, at 356–57; see also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1448 (1987) (arguing that in practice the United States under the Articles of Confederation “was not much more than the ‘United Nations’ is in 1987: a mutual treaty conveniently dishonored on all sides”).

97. Compare WOOD, *supra* note 90, at 357 (“The Confederation was intended to be, and remained, a Confederation of sovereign states.”), and James E. Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 584 (1994) (“During the period that preceded the framing, the states regarded themselves and one another as sovereign states within the meaning of the law of nations . . .”), with SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 192–94, 235–36 (1993) (arguing that, given the states’ lack of authority over foreign affairs, the states were not sovereign), Nelson, *supra* note 33, at 1576 (“[T]he [thirteen] individual states were not exactly thirteen separate countries.”), and Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1043 (1997) (arguing that under the Articles of Confederation, the states were not “nation-states in the conventional sense, fully empowered to confront the nations of Europe as equal sovereigns”).

98. See RAKOVE, *supra* note 32, at 25. In addition to an impost, the revenue plan of April 18, 1783 included a proposed revision in the method of “apportioning national expenses among the states.” See *id.*

99. MAIN, *supra* note 91, at 72.

abuse of the power of taxation, and the proposed impost revived fears of a distant government aggrandizing itself with its power to tax.

By 1786 all of the states had accepted the impost, but disagreements over how to collect the tax led to the measure's failure. According to one account, the impost ultimately failed because it ran counter to the commercial interests of some states such as Rhode Island, which imported and exported quite heavily.¹⁰⁰ But opposition to the impost was in some quarters as much political as economic; "[i]t was not money, but power, that mattered most."¹⁰¹ Democritus, summing up the prevailing view of the impost's opponents, wrote, "power, among people civilized as we are, is necessarily connected with the direction of the public money."¹⁰² The Virginia legislature declared that granting the power to tax to a body other than itself would be "injurious to its sovereignty, may prove destructive of the rights and liberty of the people, and . . . is contravening the spirit of the confederation."¹⁰³

The arguments in favor of the impost (that Congress needed the power to raise revenue in order to conduct the business of the confederacy, as opposed to the business of the individual states) and those wielded against it (that conferral of such a power on the Congress would lead to the evisceration of state sovereignty) "were soon to be employed in a greater debate."¹⁰⁴ The opponents of the impost were not yet known by the term "Anti-Federalists"—indeed, in opposing alteration of the basic allocation of authority in the confederacy, they were *pro*-federal—but their position against a consolidation of powers in Congress ultimately would form the basis of what came to be known as the Anti-Federalist view. These fledgling Anti-Federalists did not oppose every reform of the Articles of

100. *Id.* at 77; accord WOOD, *supra* note 90, at 488 ("[The debate over the impost] possessed a political and social significance that transcended economic concerns.").

101. MAIN, *supra* note 91, at 77.

102. FREEMAN'S JOURNAL (Phila.), Mar. 26, 1783, at 1; PROVIDENCE GAZETTE, May 3, 1783 (quoted in MAIN, *supra* note 91, at 79).

103. Act of October 1782, ch. XLII, reprinted in STATUTES OF VIRGINIA 171 (William Waller Hening ed., 1823), quoted in MAIN, *supra* note 91, at 80.

104. MAIN, *supra* note 91, at 102; accord THE ESSENTIAL ANTIFEDERALIST, at xii (W.B. Allen & Gordon Lloyd eds., 2d ed. 2002) (Each side in the debate over the ratification of the Constitution "was known by the reputation which it had earned in the struggles of the 1770s and 1780s" over strengthening the Union, rather than in terms of the principles which they articulated in the post-convention struggle.). The battle over the impost, which took place, off and on, over a five-year period, is emblematic of the competing views although it was not the only issue that revealed broad opposition to expanded congressional power. The same debate was waged over proposals to grant pensions for life to military officers who remained in the service for the war's duration and to grant Congress power to regulate trade. See MAIN, *supra* note 91, at 106–13.

Confederation—many supported granting more power to Congress over commerce and foreign affairs—but in general they supported only those proposals that would leave unchanged the basic structure the Articles, which preserved the states as largely sovereign entities.¹⁰⁵

In 1786, on the heels of the impost debate, the Annapolis Convention ended without achieving its immediate goal of reforming the Articles of Confederation, but produced a call for a general convention in Philadelphia the following May. Unlike the opponents of the impost, many of the supporters of the effort to reform the Articles believed that the source of the problems confronting the nation was not only the impotence of the national government, but also the parochialism and obstructionism of the states.¹⁰⁶ It is familiar history that James Madison seized the initiative early, bringing to the Convention a blueprint for a strong national government.¹⁰⁷ He found a relatively receptive audience; few delegates to the Convention had been openly opposed to a greater consolidation of authority.¹⁰⁸

That is not to say that the proposal for a more consolidated national government was without resistance, and the story of the Convention is one of repeated compromise. The most substantive proposal associated with the Anti-Federal bloc at the Convention was the New Jersey Plan, which was intended as an alternative to Randolph's Virginia Plan. The nationalistic Virginia Plan included a broad statement of powers to be vested in the national legislature; a national veto over state laws "contravening . . . the articles of Union"; the right of the national government "to call forth the force of the Union [against] any member . . . failing to fulfill its duty"; the establishment of an independent executive and judiciary, which would be joined in a council of revision; and a bicameral legislature with suffrage "to be proportioned to the Quotas of contribution, or to the number of free inhabitants."¹⁰⁹ The New Jersey Plan, in contrast, was more of a modification to the Articles of Confederation than a new structure of

105. See STORING, *supra* note 89, at 24–25.

106. See RAKOVE, *supra* note 32, at 47.

107. See, e.g., *id.* at 35–56.

108. The delegates associated with Anti-Federalist thought were George Mason of Virginia, Elbridge Gerry of Massachusetts, John Lansing and Robert Yates of New York, and John Mercer and Luther Martin of Virginia. Rhode Island, where opposition to consolidation was strong, did not send delegates to the Convention. Edmund Randolph of Virginia, who drafted the nationalistic Virginia Plan but then refused to sign the final draft of the Constitution, "began and ended as a Federalist with a brief Antifederal stage in between." MAIN, *supra* note 91, at 116; accord RAKOVE, *supra* note 32, at 134.

109. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20–21 (Max Farrand ed., rev. ed. 1937).

government.¹¹⁰ In relevant part, the New Jersey Plan proposed a unicameral Congress in which each state would be equally represented, and an expansion of Congress's existing powers to include the authority to impose an impost and to regulate foreign and interstate trade.¹¹¹ The New Jersey Plan was as much the work of delegates from small states, which feared the dilution of their influence in the union, as it was the work of Anti-Federalists, who resisted centralization of authority as a matter of principle. But the Plan was consistent with Anti-Federal views "in that the Articles were retained as the fundamental basis of government."¹¹²

After the defeat of the New Jersey Plan, several Anti-Federalists—John Lansing, Robert Yates, and John Mercer—withdrawed from the Convention. In addition, Elbridge Gerry, George Mason, and Luther Martin feared that the proposed Constitution was not sufficiently democratic, and they refused to sign the final proposal. It probably goes too far to argue, as has Jackson T. Main, that "[t]he Constitution did not, therefore, represent the views or the influence even of the moderate [Anti-Federalists], to say nothing of the majority";¹¹³ even with the failure of the New Jersey Plan, the Constitution transmitted to Congress and sent to the states for ratification was not a complete victory for the nationalists. The Connecticut Compromise rejected the Virginia Plan's formula for representation in the Senate (which was to be based on wealth or population) and instead provided for the equal representation of the states. Delegates also rejected Madison's proposal of a congressional power to negate state laws (and a proposal to authorize coercive military force to resolve conflicts between state and federal law), preferring instead contingent supremacy for federal statutes.¹¹⁴ Although important, these limitations on federal authority did not appease the Anti-Federalists' concerns.

110. *Id.* at 242 (proposing "that the articles of Confederation ought to be so revised, corrected & enlarged, as to render the federal Constitution adequate to the exigences [sic] of Government, & the preservation of the Union.").

111. *Id.* at 242–45.

112. MAIN, *supra* note 91, at 117.

113. *Id.* at 117–18.

114. See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 99 (2003) (explaining that the Supremacy Clause requires resolution of conflicts between federal and state law in favor of federal law only when the federal law has been validly enacted).

Despite the many points of disagreement among Anti-Federalists, their unifying position was opposition to the ratification of the Constitution. Two basic and fundamental beliefs animated their opposition: first, Anti-Federalists opposed the consolidation of authority in a central government, and believed in the primacy of the states; and second, Anti-Federalists believed fervently in egalitarian, democratic government. Not all Anti-Federalists subscribed to both views; the preference for a weak central government typically was more pronounced among the wealthier, large planters, who thought that liberty should be emphasized over authority, and the belief in democratic control was more associated with small farmers, who “wanted a government dominated by the many rather than the few.”¹¹⁵ On the whole, these two beliefs—aversion to consolidation of authority and support for democratic government—formed the basis of the Anti-Federalist attack on the Constitution.

These two ingredients of the Anti-Federalist position were, of course, closely related. As Gordon Wood has explained:

[T]he Antifederalists' lack of faith was not in the people themselves, but only in the organizations and institutions that presumed to speak for the people. . . . They were “localists,” fearful of distant governmental, even representational, authority for very significant political and social reasons that in the final analysis must be called democratic.¹¹⁶

The Anti-Federalists' unifying theory stemmed from the belief “that a free elective government cannot be extended over large territories.”¹¹⁷ Robert Yates, writing as “Brutus,” argued that “a free republic cannot succeed over

115. MAIN, *supra* note 91, at xiv. Although in general the democrats “accepted the doctrine of weak government,” the “advocates of weak government did not always believe in democracy.” *Id.* Professor Main argued that the divide between Federalists and Anti-Federalists mirrored the divide “between the commercial and non-commercial elements in the population.” MAIN, *supra* note 91, at 280. He further explained:

Federalists dominated the towns and the rich valleys, they included most of the public and private creditors, great landowners, lawyers and judges, manufacturers and shipowners, higher ranking civil and military officials, and college graduates. Although the Antifederalists derived their leadership from such men, the rank and file were men of moderate means, with little social prestige, farmers often in debt, obscure men for the most part.

Id. at 280–81.

116. WOOD, *supra* note 90, at 520.

117. OBSERVATIONS LEADING TO A FAIR EXAMINATION OF THE SYSTEM OF GOVERNMENT PROPOSED BY THE LATER CONVENTION; AND TO SEVERAL AND NECESSARY ALTERATIONS IN IT. IN A NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN [hereinafter LETTERS FROM THE FEDERAL FARMER], *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 223, ¶ 2.8.14, at 230 (Herbert J. Storing ed., 1981) (letter of Oct. 8, 1787).

a country of such immense extent, containing such a number of inhabitants, and these encreasing in such rapid progression as that of the whole United States.”¹¹⁸ A small republic, in the Anti-Federalist view, was the only unit that could ensure the voluntary attachment of the people to the government, and the responsibility and accountability of the government to the people. As The Federal Farmer argued,

[t]he great object of a free people must be so to form their government and laws, and so to administer them, as to create a confidence in, and respect for the laws; and thereby induce the sensible and virtuous part of the community to declare in favor of the laws, and to support them without an expensive military force.¹¹⁹

In a smaller republic, the people would have “knowledge of those who govern” and would accordingly submit more readily to governmental authority.¹²⁰ Smaller republics, moreover, were more likely to have homogeneous populations; because diversity would inevitably lead to laws that favor some groups over others, friction was more likely in larger societies and less likely in smaller ones.

Similarly, the Anti-Federalists believed that representative government could be *responsible* to the people only if the republic were small enough that the representatives would be directly *answerable* to the people. In small republics, elected representatives would “be a true picture of the people; possess the knowledge of their circumstances and their wants; sympathize in all their distresses, and be disposed to seek their true interests.”¹²¹ But in a large republic—like the proposed United States—the ratio of constituents to representatives would be so large that accountability would be lost.¹²² That, in the view of the Anti-Federalists, was a recipe for tyranny.

To the Anti-Federalists, a strong central government would desperately lack the democratic virtues of the states. Only representative government in smaller units—such as the existing states from the

118. BRUTUS, TO THE CITIZENS OF THE STATE OF NEW YORK (Oct. 18, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 117, at 363, ¶ 2.9.11, at 368.

119. LETTERS FROM THE FEDERAL FARMER, *supra* note 117, at 234, 234 (letter of Oct. 10, 1787).

120. STORING, *supra* note 89, at 17 (quoting THE LETTERS OF RICHARD HENRY LEE 464 (James C. Ballagh ed., 1911–1914)).

121. SPEECH BY MELANCTON SMITH AT THE CONVENTION OF THE STATE OF NEW YORK ON THE ADOPTION OF THE FEDERAL CONSTITUTION (June 21, 1788), *reprinted in* 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 117, at 155, 157.

122. See, e.g., LETTERS FROM THE FEDERAL FARMER, *supra* note 117, at 294, 300 (letter of Jan. 12, 1788).

Confederation—would preserve these benefits. As a result, Anti-Federalists believed first and foremost in the primacy of the states, a position the states enjoyed under the Articles of Confederation. The Anti-Federalists found the proposed Constitution rife with indications of the demise of the states as the primary locus of sovereignty. The national government would have the power to tax; the Necessary and Proper Clause made the other powers seem that much more expansive; and the Supremacy Clause was the smoking gun. Even the elegant phrasing of the Preamble, speaking with the voice of “We, the People,” convinced many, including Patrick Henry, that the Constitution intended the dilution of the states’ authority:

[W]hat right had they to say, *We, the People*[?] My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask who authorised them to speak the language of, *We, the People*, instead of *We, the States*? States are the characteristics, and the soul of a confederation. If the States be not the agents of this compact, it must be one great consolidated National Government of the people of all the States.¹²³

Likewise, the procedure in Article VII of the Constitution, which provided that “[t]he ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same,”¹²⁴ was flatly inconsistent with the requirement of unanimous consent for constitutional changes under the Articles of Confederation.¹²⁵ This was too much for some Anti-Federalists to swallow.¹²⁶

The Anti-Federalist alternative to consolidation was preservation (perhaps with modifications) of a confederation in which the states remained the primary sovereigns. “The defense of the federal character of the American union [under the Articles of Confederation] was the most prominent article of Anti-Federalist conservative doctrine.”¹²⁷ In this sense, the Anti-Federalists (as they came to be known) were in fact the true “federalists.” They stood for federalism—that is, a confederation of equal and largely independent states—“in opposition to what they called the consolidating tendency and intention of the Constitution—the tendency to

123. SPEECH OF PATRICK HENRY IN THE VIRGINIA RATIFYING CONVENTION (June 4, 1788), reprinted in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 117, at 209, 211; see also LETTER OF SAMUEL ADAMS TO RICHARD HENRY LEE (Dec. 3, 1787), reprinted in 4 THE WRITINGS OF SAMUEL ADAMS 324 (Harry Alonzo Cushing ed., 1908) (“[A]s I enter the Building I stumble at the Threshold.”).

124. U.S. CONST. art. VII.

125. ARTS. OF CONFEDERATION art. XIII (1781).

126. See STORING, *supra* note 89, at 12–14.

127. *Id.* at 9.

establish one complete national government, which would destroy or undermine the states.”¹²⁸

Whether one views the label “Anti-Federalist” as the “penalty of defeat”¹²⁹ or instead as a fair but effective exploitation of the term by supporters of the Constitution,¹³⁰ the indisputable point is that the Federalists supported the Constitution principally because they believed that it created a stronger, more consolidated national government, and the Anti-Federalists opposed it for the same reason. The record suggests that the Anti-Federalists were correct to suspect that the Federalists hoped “to prostrate all the State legislatures [and] form a general system out of the whole.”¹³¹ Indeed, at the Philadelphia convention Edmund Randolph “candidly confessed” that he proposed the Virginia Plan not because he wanted to create a “federal government,” but because he wanted to create “a strong *consolidated* union, in which the idea of states should be nearly annihilated.”¹³² Similarly, Gouverneur Morris explained that the Plan envisioned a “*national, supreme, Government*,” based on the principle “that in all communities there must be one supreme power, and one only.”¹³³ James Madison (joined by James Wilson) strongly opposed equal representation of the states in the Senate and elimination of the negative on state laws because they hoped to “deny any recognition of state sovereignty in the Constitution, and thus prevent a reversion to the evils of the Confederacy.”¹³⁴

Madison also disagreed with the principal Anti-Federalist premise. Small states with homogeneous populations were not the solution to the problems confronting the Confederation, he believed, but rather were the

128. *Id.* at 10. One can be forgiven for wondering at this point why, if the Anti-Federalists supported the confederation and opposed the Constitution because of its consolidating (and therefore anti-federal) tendencies, they are not known by the label “Federalists.” One account is that the label, “far from being their own choice, was imposed upon them by their opponents,” to imply that the Anti-Federalists “were mere obstructionists, without any positive plan to offer.” MAIN, *supra* note 91, at xi. The other account is that the term “federal” enjoyed a certain ambiguity at the time. When the Articles of Confederation was the governing charter, the term was often used (by supporters and detractors alike) to describe the “instrumentality of the federation per se”—that, is the general government and Congress—and a person was “federal” if he demonstrated willingness “to strengthen or support the institutions of the federation.” STORING, *supra* note 89, at 9.

129. MAIN, *supra* note 91, at xi.

130. STORING, *supra* note 89, at 10.

131. LETTER OF WILLIAM GRAYSON TO JAMES MONROE (May 29, 1787), reprinted in 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 109, at 30.

132. 1 *id.* at 24.

133. *Id.* at 34.

134. WOOD, *supra* note 90, at 525–26.

source of the problem. In the small republic, Madison argued, there was significant risk that popular majorities, united by “an apparent interest or common passion,” would work “unjust violations of the rights and interests of the minority, or of individuals.”¹³⁵ But “enlargement of the sphere” of the republic would cure this defect of small-scale democracy “because a common interest or passion is less apt to be felt and the requisite combinations less easy to be formed by a great than a small number.”¹³⁶ Factions, in other words, would “check each other, whilst those who may feel a common sentiment have less opportunity of communication and concert.”¹³⁷

Madison’s theory of faction also was responsive to the second principal Anti-Federalist critique of the proposed Constitution: that the charter was not sufficiently democratic. As Gordon Wood has explained, the Anti-Federalists were “true champions of the most extreme kind of democratic and egalitarian politics expressed in the Revolutionary era.” They “believed that popular government itself, as defined by the principles of 1776, was endangered by the new national government.”¹³⁸ Indeed, although generally not oblivious to the risks of majoritarian oppression, several prominent Anti-Federalists seemed to have expressed the view that majoritarian rule by definition cannot be tyrannical.¹³⁹ The Constitution, they believed, at best would create a government by aristocracy.

Federalists did not exactly disagree with this characterization; this is evident from their response to Anti-Federalist claims that the voluntary attachment of the people to their government was possible only in small republics. Alexander Hamilton argued that such loyalty would remain only as long as the state governments were administered well, and that the federal government would command similar loyalty if it were better administered.¹⁴⁰ Hamilton likely thought that the federal government would be better administered, in large part because “the extension of the spheres of election will present a greater option, or latitude of choice, to the

135. JAMES MADISON, VICES OF THE POLITICAL SYSTEM, *reprinted in* 9 PAPERS OF MADISON 351–57 (Robert A. Rutland et al. eds., 1975), *quoted in* RAKOVE, *supra* note 32, at 50.

136. *Id.* at 356–57.

137. *Id.* at 357; *see also* THE FEDERALIST NO. 10 (James Madison).

138. WOOD, *supra* note 90, at 516.

139. *See, e.g.,* SPEECH BY GEORGE CLINTON BEFORE THE NEW YORK STATE RATIFYING CONVENTION (June 27, 1788), *reprinted in* 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 117, at 178, 178 (stating that “the will of the people . . . is the law”); BRUTUS TO THE CITIZENS OF THE STATE OF NEW YORK (Nov. 29, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 117, at 382, 383 (arguing that only way to avoid tyrannical government is to have “an equal, full and fair representation”).

140. *See* THE FEDERALIST NO. 17 (Alexander Hamilton).

people.”¹⁴¹ Federalists believed that this “elitist theory of democracy” would save popular government and the Revolution “from their excesses.”¹⁴² The debate over ratification thus pitted largely irreconcilable positions against each other. “What Brutus saw as the great defect of the Constitution . . . Madison and others saw as its greatest virtue.”¹⁴³

But the debate was just that—a debate—and Federalist supporters of the Constitution set out not simply to demonstrate what they viewed as the shortcomings of Anti-Federalist theory, but also to cast the proposed Constitution in the light most likely to alleviate some of the more damaging Anti-Federalist critiques. Indeed, although most Federalists were convinced that the Constitution’s provision for a strong central government was the appropriate cure for the Confederacy’s ills, Anti-Federalist concerns resonated among broad sections of the population.¹⁴⁴ Accordingly, the battle waged over ratification in the press and at the state conventions was quintessentially political, characterized by defenses and attacks that were alternately genuine, hyperbolic, and obfuscatory.

During the ratification debates, Anti-Federalists began to shift the focus of their attack. Perhaps recognizing the force of the Federalist argument that the main defect of the Articles of Confederation was the weakness of its central government, Anti-Federalists increasingly focused on the need for a bill of rights to limit the power of the national government. “[I]n forming a government on its true principles,” Brutus argued, “the foundation should be laid . . . by expressly reserving to the people such of their essential natural rights, as are not necessary to be parted with.”¹⁴⁵ It had been an article of faith among Anti-Federalists that a truly federal government required no bill of rights, because under such an arrangement the central government’s powers (and thus power to do harm to individual liberties) would be strictly circumscribed;¹⁴⁶ indeed, the Articles of Confederation contained no explicit protection for individual rights. Therefore, by arguing for a bill of rights, the Anti-Federalists conceded that the Constitution (as submitted for ratification) would create

141. THE FEDERALIST NO. 27 (Alexander Hamilton).

142. WOOD, *supra* note 90, at 517.

143. STORING, *supra* note 89, at 47.

144. For a detailed discussion of Anti-Federalist support during the ratification debates, see MAIN, *supra* note 91, at 187–248.

145. BRUTUS, TO THE CITIZENS OF THE STATE OF NEW YORK (Nov. 1, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 117, at 372, 373.

146. See, e.g., NEW HAMPSHIRE FREEMAN’S ORACLE (Jan. 18, 1788), quoted in STORING, *supra* note 89, at 65 & n.8.

a strong national government. “[I]n making this reply the Anti-Federalists decisively abandoned the doctrine of strict federalism.”¹⁴⁷

This does not suggest that the Federalists unabashedly asserted during the ratification debates that the Constitution created an unambiguously strong national government that would lead to the eventual evisceration of the states. On the contrary, although many prominent Federalists had expressed their view during the Philadelphia convention that the national government should be unapologetically strong,¹⁴⁸ during the ratification debates Federalists tended to coopt the language of their Anti-Federalist critics, arguing that the Constitution adequately delineated the respective spheres of the national and state governments and preserved significant authority to the states. For example, in a famous speech in front of the Pennsylvania statehouse, James Wilson argued that the Constitution did not require a bill of rights because the national government could exercise only those powers delegated by “positive grant expressed in the instrument of the union.”¹⁴⁹ The argument that the national government’s powers were limited to those enumerated implied not only that a bill of rights was unnecessary, but also that the states retained all powers not delegated to the national government. Similar arguments appear in Federalist writings in support of ratification.¹⁵⁰ Given their statements at the Philadelphia convention and in other sources, however, there is little doubt that most prominent Federalists hoped to circumscribe state authority more severely than their polemics let on.¹⁵¹

In the end, the states ratified the Constitution, but several state ratification conventions gave voice to Anti-Federalist suggestions by proposing amendments to the new Constitution; two years later, the states ratified the Bill of Rights. It risks oversimplification to talk about who

147. STORING, *supra* note 89, at 65.

148. See *supra* notes 131–134 and accompanying text.

149. JAMES WILSON, SPEECH AT A PUBLIC MEETING IN PHILADELPHIA (Oct. 6, 1787), reprinted in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 337, 339 (John P. Kaminski & Gaspare J. Saladino eds., 1981) [hereinafter DOCUMENTARY HISTORY].

150. See, e.g., THE FEDERALIST NO. 45 (James Madison) (“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”).

151. According to historian Jackson T. Main:

The Federalists met this attack by an attempt to deny the accusation in public, but it seems from their private statements that they intended to create a national government, although prevailing opinion obliged them to compromise. The records of the debates in the Philadelphia Convention are convincing evidence of this intention; the real convictions of the Federalist delegates can also be discovered in letters and journals.

MAIN, *supra* note 91, at 121 ; see also RAKOVE, *supra* note 32, at 142–51; STORING, *supra* note 89, at 38; WOOD, *supra* note 90, at 525–26.

“won” the debate over the Constitution, but Herbert Storing’s summary is relatively uncontroversial:

While the Federalists gave us the Constitution, . . . the legacy of the Anti-Federalists was the Bill of Rights. But it is an ambiguous legacy, as can be seen by studying the debate. Indeed, in one sense, the success of the Bill of Rights reflects the failure of the Anti-Federalists. The whole emphasis on reservations of rights of individuals implied a fundamental acceptance of the “consolidated” character of the new government.¹⁵²

Even if one accepts (as I think one must) that the Federalists “won”—at least in the narrow sense that the Constitution, which they supported, was ratified—the original meaning of the document, particularly with respect to specific questions unanswered by the text, is far from obvious, and the difficulties in determining a single original meaning stem from the very nature of the debate over the document’s drafting and ratification.

B. Methodological Difficulties

As explained above,¹⁵³ whether it is appropriate to seek the original understanding of the Constitution to answer modern questions of constitutional law is a highly controversial question in its own right. With respect to questions of federalism, however, the members of the Court seem to agree that originalism is the appropriate methodology. Therefore, assuming that the original understanding ought to be accorded dispositive weight, one needs a means of determining what precisely the original understanding *was*. Here the disagreement begins.

Originalism’s most ardent defenders readily point out that “it is often exceedingly difficult to plumb the original understanding of an ancient text . . . a task sometimes better suited to the historian than the lawyer.”¹⁵⁴ This is true, Justice Scalia has noted, because seeking the original understanding

152. STORING, *supra* note 89, at 65; see also THE ESSENTIAL ANTIFEDERALIST, *supra* note 104, at xiv–xv (“Although the Federalists won the debate, they did not get everything that they desired. Antifederalist political theory entered the very nature of the American system, for example, by virtue of its inclusion in the Constitution itself.”).

153. See *supra* notes 58–72 and accompanying text.

154. Scalia, *supra* note 24, at 856–57; see also BORK, *supra* note 34, at 163 (acknowledging that “two judges equally devoted to the original purpose may disagree about the reach or application of the principle at stake and so arrive at different results, but that in no way distinguishes the task from the difficulties of applying any other legal writing.”).

requires the consideration of an enormous mass of material—in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material . . . And further still, it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day.¹⁵⁵

Justice Scalia is surely correct, and his concession brooks no dissent from critics of originalism. But the Court's actual pattern of decision suggests that the task of seeking the original understanding is terribly complicated for a more fundamental reason, one that stems in large part from the nature of the founding.

As Part II.A makes clear, the framing and ratification debates vented competing views of the most fundamental constitutional issues: sovereignty, democracy, republicanism, and federalism, to name only the most prominent. Although it is easy to forget from our vantage point, the debate over the Constitution was political, in the best and worst senses of the term. Anti-Federalists sometimes acknowledged the need for constitutional reform,¹⁵⁶ and other times described the Constitution's provisions in wildly hyperbolic terms in attempts to hasten its demise.¹⁵⁷ Likewise, Federalists expressed bold interpretations of the Constitution in some fora¹⁵⁸—preaching to the choir, if you will—and offered more temperate readings in others to cajole and persuade opponents and the undecided to support ratification.¹⁵⁹

To take the most prominent example, although *The Federalist*—cited regularly by both the federalism majority and dissent on the current Court

155. Scalia, *supra* note 24, at 856–57.

156. See MAIN, *supra* note 91, at 255; STORING, *supra* note 89, at 24–25.

157. RAKOVE, *supra* note 32, at 147 (Anti-Federalist “polemics often drifted off into implausible predictions of tyranny lurking in obscure clauses”).

158. See *supra* notes 132–151 and accompanying text.

159. As Alpheus Mason explained:

To quiet the fears of opponents, advocates of ratification said things which, in later years, proved embarrassing to themselves and misleading to scholars. On the other hand, certain of the Constitution's enemies turned alarmist, portraying the proposed national charter in the most extreme terms. The strategy obscured positions on all sides and made the Constitution's meaning less than crystal clear.

Alpheus T. Mason, *The Federalist—A Split Personality*, in ORIGINS OF AMERICAN POLITICAL THOUGHT 163, 168 (John P. Roche ed., 1967); see also RAKOVE, *supra* note 32, at 149–55.

to ascertain the original understanding¹⁶⁰—has obvious significance as a “detailed, contemporaneous exposition of the Constitution by authors who were intimately familiar with its legal and political background,” it “is nonetheless a piece of political advocacy, whose contents may at times reflect the exigencies of debate, rather than a dispassionate account of constitutional meaning.”¹⁶¹ Alexander Hamilton, James Madison, and John Jay shared responsibility for authoring the *Federalist Papers*, which they wrote principally to support the campaign for ratification in New York.¹⁶² As John Manning has observed, far from being “a neutral observer’s detached exposition of constitutional meaning,” *The Federalist* was “merely an exercise in political persuasion.”¹⁶³ As an analysis of and justification for the Constitution’s provisions, *The Federalist* is an indispensable resource; as evidence of the original understanding it is suspect because of its obvious strategic objectives.¹⁶⁴

The difficulties of seeking the original meaning go beyond the taint of tactical politics one finds on much of the evidence of the original understanding. Should ratification be understood as an implicit *rejection* of Anti-Federalist concerns? Or did the state conventions ratify the Constitution only because of Federalist assurances that the Constitution *in fact addressed* the Anti-Federalists’ concerns? Although the Justices on the current Court rarely acknowledge their positions expressly, the study described below demonstrates that the majority answers the latter question in the affirmative, whereas the dissent answers the former in the affirmative.

The matter is complicated further by the actual process of ratification. The proposed Constitution provided that states would decide whether to ratify in “Conventions”¹⁶⁵ instead of in extant state legislatures. The

160. See generally Ira C. Lupu, *The Most-Cited Federalist Papers*, 15 CONST. COMMENT. 403 (1998).

161. Manning, *supra* note 14, at 1339. For an interesting colloquy with Professor Manning on the propriety of reference to *The Federalist* in constitutional decisionmaking, see William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1306–07 (1998); Ira C. Lupu, *Time, the Supreme Court, and The Federalist*, 66 GEO. WASH. L. REV. 1324 (1998).

162. See Clinton Rossiter, *Introduction to THE FEDERALIST PAPERS*, at viii–lx (Clinton Rossiter ed., 1961); Cecil L. Eubanks, *New York: Federalism and the Political Economy of Union*, in *RATIFYING THE CONSTITUTION* 300, 310 (Michael Allen Gillespie & Michael Lienesch eds., 1989).

163. Manning, *supra* note 14, at 1351–52.

164. Eskridge, *supra* note 161, at 1309.

165. U.S. CONST. art. VII (“The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”).

framers of the Constitution chose this method of ratification for two reasons. First, “[p]opular ratification provided more than a symbolic affirmation of popular sovereignty; it promised to render a constitution legally superior to ordinary acts of government that also expressed popular consent through mechanisms of representation.”¹⁶⁶ Second, Federalists made a more “pragmatic and political” judgment that the Constitution stood a better chance of ratification in special conventions than in state assemblies, because the latter might be reluctant “to approve a constitution circumscribing their legislative power and autonomy.”¹⁶⁷

Each state’s ratifying convention was composed of delegates selected by the people in a special vote for that purpose.¹⁶⁸ In New York there was something akin to an organized Anti-Federalist party with a traditional party apparatus,¹⁶⁹ and men who stood for election elsewhere as delegates often were identified as Federalists or Anti-Federalists.¹⁷⁰ If, as some originalists maintain,¹⁷¹ the authoritative understanding is that of the average citizen at the time of the ratification, then the delegate system suggests that the debates at the state conventions are of limited use in ascertaining the original understanding. If it is fair to assume that citizens chose delegates to the conventions based on their pledged willingness to support (or oppose) the Constitution, then the decision about whether to

166. RAKOVE, *supra* note 32, at 101.

167. *Id.* at 102–04. Edmund Randolph, speaking at the Philadelphia convention, put it less charitably: “Whose opposition will be most likely to be excited agst. The System? That of the local demagogues [sic] who will be degraded by it from the importance they now hold.” 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 109, at 89.

168. See Lance Banning, *Virginia: Sectionalism and the General Good*, in RATIFYING THE CONSTITUTION, *supra* note 162, at 261, 277 (Virginia); Edward J. Cashin, *Georgia: Searching for Security*, in RATIFYING THE CONSTITUTION, *supra* note 162, at 93, 93 (Georgia); Eubanks, *supra* note 162, at 300, 317 (New York); Michael Allen Gillespie, *Massachusetts: Creating Consensus*, in RATIFYING THE CONSTITUTION, *supra* note 162, at 138, 147 (Massachusetts); John P. Kaminski, *Rhode Island: Protecting State Interests*, in RATIFYING THE CONSTITUTION, *supra* note 162, at 368, 383 (Rhode Island); Donald S. Lutz, *Connecticut: Achieving Consent and Assuring Control*, in RATIFYING THE CONSTITUTION, *supra* note 162, at 117, 129 (Connecticut); MAIN, *supra* note 91, at 214–15 (Maryland); *id.* at 242–43 (North Carolina); *id.* at 188–89 (Pennsylvania); Gaspare J. Saladino, *Delaware: Independence and the Concept of a Commercial Republic*, in RATIFYING THE CONSTITUTION, *supra* note 162, at 29, 41 (Delaware); Sara M. Shumer, *New Jersey: Property and the Price of Republican Politics*, in RATIFYING THE CONSTITUTION, *supra* note 162, at 71, 72 (New Jersey); Robert M. Weir, *South Carolina: Slavery and the Structure of the Union*, in RATIFYING THE CONSTITUTION, *supra* note 162, at 201, 201 (South Carolina); Jean Yarbrough, *New Hampshire: Puritanism and the Moral Foundations of America*, in RATIFYING THE CONSTITUTION, *supra* note 162, at 235, 238–39 (New Hampshire).

169. See MAIN, *supra* note 91, at 233–34. In New York, Governor George Clinton ran a well-organized political machine and was a staunch opponent of the Constitution. *Id.*

170. See *id.*

171. See *supra* notes 37–43 and accompanying text.

ratify had effectively already been made when the delegates arrived at the convention.¹⁷² The historical records reflect that the debates at the conventions were more than perfunctory and swayed some votes one way or the other, although it appears that more Anti-Federalist delegates voted to ratify than Federalist delegates voted to oppose.¹⁷³ By and large, however, the average citizen had effectively already made his decision about whether to ratify when his chosen delegate arrived at the convention. In at least two states (New Hampshire and Rhode Island), towns formed committees to issue “instructions” to delegates about how to vote at the convention.¹⁷⁴ Because many Anti-Federalist delegates in New Hampshire were convinced by arguments at the convention in favor of the Constitution, the convention was forced to adjourn so that delegates could confer with their constituents before convening again with instructions to ratify.¹⁷⁵ The delegates’ (that is, the ratifiers’) understanding of the Constitution’s meaning, therefore, is relevant only if one assumes either that it is a valid proxy for citizen understanding, or that citizens selected delegates not to represent faithfully established citizen views, but rather to exercise independent judgment about what was in the best of interest of the delegates’ constituents.

It is beyond the scope of this project to resolve (if, indeed, that is possible) these questions that have long vexed the search for original understanding. It suffices for present purposes to note that “[t]he existence of ‘original disagreement’”¹⁷⁶ greatly complicates the quest for original

172. James Madison, for one, expressed his belief (which surely confirmed everything that Anti-Federalists thought of the Constitution’s anti-democratic tendencies) that there were subjects to which the capacities of the bulk of mankind are unequal and on which they must and will be governed by those with whom they happen to have acquaintance and confidence. The proposed Constitution is of this description. The great body of those who are both for & against it, must follow the judgment of others not their own.

LETTER OF MADISON TO RANDOLPH (Jan. 10, 1788), reprinted in 10 PAPERS OF MADISON 354, 354–56 (Robert A. Rutland et al. eds., 1977), quoted in RAKOVE, *supra* note 32, at 139.

173. See MAIN, *supra* note 91, at 256.

174. Rhode Island had a particularly circuitous route to ratification. The state first refused to send delegates to the Philadelphia convention, and then refused to take action on the proposed Constitution until March 1788, when voters in a referendum lopsidedly rejected a proposal to convene a ratifying convention. Over the next two years, the state Assembly defeated motions for a convention nine times; the ninth time was in response to instructions from towns to delegates to the Assembly. After the new national Congress proposed a Bill of Rights (and threatened to impose economic sanctions on Rhode Island if it failed to ratify) the Assembly voted to hold a convention, and then elected delegates on Feb 8, 1790. The convention ratified the Constitution on May 29 in a closely divided vote. See Kaminski, *supra* note 168, at 379–85.

175. See Yarbrough, *supra* note 168, at 238–39.

176. Powell, *supra* note 42, at 950.

meaning. With these difficulties in mind, I turn now to the results of my study of the Court's actual practice in citing views from the founding era.

III. THE COURT'S SOURCES OF FEDERALISM: AN EMPIRICAL STUDY

A. Preliminary Matters

First, a note about scope. For this project, I reviewed every federalism case decided by the Court since 1970, shortly before President Nixon appointed William H. Rehnquist to the Supreme Court.¹⁷⁷ Defining which cases would constitute the study's pool of cases required the drawing of some arbitrary lines. The "federalism" cases that I considered exhibited the following characteristics: (1) they involved in a direct way¹⁷⁸ the extent of the power of the federal government or the state governments,¹⁷⁹ or the boundary between federal and state power; (2) they required for their decision reference to (a) a provision of the Constitution as originally

177. I also reviewed hundreds of federalism cases decided before 1970, from *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)—perhaps the first big federalism case—to *Maryland v. Wirtz*, 392 U.S. 183 (1968), which addressed an issue that has perplexed and divided the Court since. I have not included these cases in the study for two principal reasons. First as explained above, see *supra* notes 72–87 and accompanying text, although originalism has some historical pedigree as a method of constitutional interpretation, extensive reference to the documentary history of the founding era is a relatively new development. Supreme Court federalism decisions before 1970 cited to the specific views of individuals from the framing and ratification period only sporadically at best; it is therefore highly suspect (and quite difficult) to draw any conclusions from the data sample about citation tendencies. Second, because both federalism and originalist methodologies have experienced a revival on the current Court, the principal object of the study is to compare the citation pattern of the majority on the *current* Court to that of the *current* Court's dissenters in federalism cases.

178. Many cases indirectly involve the powers of the federal and state governments or the boundary between federal and state power. To take but one obvious example, the debate over whether the Fourteenth Amendment incorporated the protections of the Bill of Rights was in no small part a debate over federalism—that is, over whether the Constitution limited the powers of the state governments in the area of criminal procedure. Such cases turn on an interpretation of the Fourteenth Amendment, which I have (mostly) excluded from the study. See *infra* notes 190–193 and accompanying text.

179. I have also excluded several categories of cases that involve limits imposed by specific constitutional provisions on the respective powers of the state and federal governments, because those cases implicate structural principles or concerns over individual rights that transcend concerns over federalism. For example, I have not included cases involving the Bill of Attainder or Ex Post Facto clauses, U.S. CONST. art. I, § 9, cl. 3 & § 10, cl. 1, or any of the other provisions in Article I, sections 9 and 10, even though those provisions expressly limit the powers of the state and federal governments. For the same reason, I have excluded habeas cases. (As it turns out, very few habeas cases involve discussion of views from the founding era, so their exclusion from the study does not have any distorting effect.) For similar reasons, I have not considered cases that turn on interpretation of the amendments (other than the Tenth) in the Bill of Rights.

ratified, (b) the Tenth Amendment,¹⁸⁰ (c) the Eleventh Amendment,¹⁸¹ or (d) a principle inferred from the structure of the Constitution; (3) the Court produced at least one opinion that sought to ascertain the original understanding;¹⁸² and (4) the decisions were not unanimous.¹⁸³ Guided by

180. Although the Tenth Amendment was not part of the Constitution as originally ratified, it confirmed the theory of enumerated powers, which the Constitution's proponents had offered to allay Anti-Federalist concerns about the breadth of the national government's power. See *supra* notes 144–151 and accompanying text.

181. Although the Eleventh Amendment, which Congress formally proposed to the states for ratification in 1794, was not ratified until late 1797, the Court has held that it “confirmed, rather than established, sovereign immunity as a constitutional principle; it follows that the scope of the States’ immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design.” *Alden v. Maine*, 527 U.S. 706, 728–29 (1999). Cases that Federal Courts casebooks once referred to as “Eleventh Amendment” cases now turn not on the meaning of the Eleventh Amendment, but on the original understanding of state sovereign immunity.

182. For example, in *New York v. United States*, 505 U.S. 144 (1992), both Justice O’Connor’s opinion for the Court, see *id.* at 166 (“In providing for a stronger central government, . . . the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.”), and Justice Stevens’s dissent, see *id.* at 210 (“[T]he Framers of the Constitution empowered the Federal Government to exercise legislative authority directly over individuals within the States, even though that direct authority constituted a greater intrusion on state sovereignty.”), purported to seek the original understanding, but Justice White’s dissent appears to have rejected originalism as the appropriate interpretive methodology, see *id.* at 207 n.3 (“One would not know from reading the majority’s account, for instance, that the nature of federal-state relations changed fundamentally after the Civil War. . . . Moreover, the majority fails to mention the New Deal era, in which the Court recognized the enormous growth in Congress’ power under the Commerce Clause.”).

183. There are very few unanimously decided federal cases that cite to founding era views. See, e.g., *United States v. Locke*, 529 U.S. 89, 99 (2000) (citing THE FEDERALIST NOS. 12 (Alexander Hamilton), 44 (James Madison), and 64 (John Jay) for the proposition that Congress has authority “to regulate interstate navigation, without embarrassment from intervention of the separate States”); *Howlett v. Rose*, 496 U.S. 356, 368–69 (1990) (citing THE FEDERALIST NO. 82 (Alexander Hamilton)). It is equally defensible to attribute the views cited in these cases to both the more conventional majority and dissenting blocs, or simply not to attribute them to either side. I have chosen the latter path.

I have also excluded the relatively rare cases in which the voting breakdown differs significantly from the conventional federalism voting pattern. For example, Justice Souter’s opinion for the majority in *American Insurance Associates v. Garamendi*, 539 U.S. 396, 414 (2003), cites THE FEDERALIST NOS. 42, 44 (James Madison), and 80 (Alexander Hamilton) for the nationalistic view that the Constitution broadly prohibits the states from engaging in foreign relations; but the opinion was joined by Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Breyer—Justices Stevens, Scalia, and Thomas joined Justice Ginsburg’s dissent. I have not included this small group of cases in the study because it would be impossible to characterize the views of the majority and dissenting Justices categorically as I have with the cases included in the study.

If there were many unanimous decisions or cases in which the decision produced nonconventional voting blocs, then it might suggest that the debate I describe below between the majority and the dissent is more heat than light. But the cases in these two categories constitute a tiny percentage of the federalism cases overall, and therefore are more readily considered the exception to the rule rather than the rule itself.

this definition, I selected and reviewed cases involving state sovereign immunity;¹⁸⁴ Congress's power to regulate interstate commerce;¹⁸⁵ the dormant commerce clause;¹⁸⁶ preemption;¹⁸⁷ federal common law;¹⁸⁸ abstention;¹⁸⁹ and several other topics.

Conspicuously absent from this list is the Fourteenth Amendment, which, along with the other Reconstruction Amendments, "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress."¹⁹⁰ I have excluded most Fourteenth Amendment cases for two often overlapping reasons. First, many Fourteenth Amendment cases involve (in a more direct way than most federalism cases) constraints imposed on state power in order to protect individual rights.¹⁹¹ In this sense, the Fourteenth Amendment is more like the limits on state power in Article I, section 10, which I have not included in the study. Second, to the extent that the Court is concerned with the original understanding in Fourteenth Amendment cases, it is generally concerned with the original understanding of *the*

184. See *supra* note 181.

185. See U.S. CONST. art. I, § 8, cl. 3.

186. The Court has long interpreted the affirmative grant of power to Congress to regulate interstate commerce to imply limits on the power of the states over interstate commerce. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571 (1997); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

187. Because federal statutory law is the "supreme Law of the Land," "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," U.S. CONST. art. VI, § 2, state laws that conflict with federal law or "stand as an obstacle to the accomplishment and execution" of federal law are preempted, see *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989). Federalism concerns have led to the development in preemption cases of the canon of construction that "[t]he exercise of State authority in a field traditionally occupied by State law will not be deemed preempted by a federal statute unless that was the clear and manifest purpose of Congress." *Southland Corp. v. Keating*, 465 U.S. 1, 18 (1984) (citing THE FEDERALIST NO. 32 (Alexander Hamilton)).

188. Although limits on the power of the federal courts to develop common law often are phrased in terms of the separation of powers, the development of federal common law also raises federalism concerns because of the Supremacy Clause. See generally Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996).

189. Judicial solicitude for "Our Federalism," see *Younger v. Harris*, 401 U.S. 37, 44 (1971), has led the Court to develop a complex doctrine in which federal courts abstain from hearing "cases where necessary to promote the integrity of state law and respect the autonomy of state judicial bodies." 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-28, at 568 (3d ed. 2000).

190. *Ex parte Virginia*, 100 U.S. 339, 345 (1879).

191. The Fourteenth Amendment states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

Fourteenth Amendment, which requires reference not to the debates between eighteenth-century Federalists and Anti-Federalists, but to the debates between the proponents and opponents of Reconstruction.¹⁹² When cases involving the Fourteenth Amendment have also involved interpretation of the original Constitution or the Tenth or Eleventh Amendments, however, I have included them here.¹⁹³

This brief statement about the scope of the study reveals that there is an uncomfortable imprecision in any attempt to draw conclusions from even a “comprehensive” consideration of Supreme Court federalism decisions. Even if the question of scope were easily resolved, problems (in addition to the general hazards of empiricism in legal scholarship)¹⁹⁴ would still arise in the analysis of the Court’s citation patterns. As will become evident below, one cannot draw conclusions from the Court’s reliance on particular founding-era statements without a careful consideration of context. For example, mere *reference* to Anti-Federalist views does not demonstrate *reliance* on Anti-Federalist views to determine original meaning; those views can be cited just as easily (and often are by the dissent) to demonstrate that they did *not* represent the original understanding.

Context also matters in other ways. It is not uncommon for the majority and the dissent to rely on the same founding-era statement to support competing views of the original understanding. In such instances, the framer cited (and the view he expressed) is generally less important than the manner in which the Court has deployed the statement. These disagreements have implications for originalism, but not in the same way as the disagreements over *which* framing-era voices matter. In other words, although the results of the study discussed below are important, they do not exhaust the ways in which reasonable minds can disagree about the original understanding; one cannot simply infer from the existence of debate on the

192. For an example of a case in which the Court canvassed the Reconstruction ratification debates in an attempt to discern the original understanding of the Fourteenth Amendment, see *City of Boerne v. Flores*, 521 U.S. 507 (1997).

193. Accordingly, I have included cases involving whether Congress has acted validly pursuant to section five of the Fourteenth Amendment to abrogate the states’ sovereign immunity, because those cases also turn on an interpretation of the Eleventh Amendment and the constitutional structure. See, e.g., *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003). Conversely, I have not included cases involving Congress’s section five power when the question of abrogation was not at issue. See, e.g., *City of Boerne*, 521 U.S. 507.

194. See, e.g., Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153 (2002).

Court over the original understanding that the competing factions on the Court in fact *do* rely on competing framing-era views.

With these difficulties in mind, I divided citations to founding-era views into three general categories: nationalistic statements by proponents of the Constitution; more tempered, federalistic statements by Federalists offered as responses to Anti-Federalist arguments about the Constitution's meaning; and statements by Anti-Federalists about the Constitution's meaning. The third category presented no difficulties of definition or characterization, other than the historical difficulty of determining conclusively that the individual cited was in fact an opponent of the Constitution. Similarly, the first category is fairly easily identifiable; it is not difficult to identify a particular statement—take, for example, Randolph's assertion at the Philadelphia convention that he hoped to create “a strong *consolidated* union, in which the idea of states should be nearly annihilated”¹⁹⁵—as strongly nationalistic.

It is the second category that creates difficulties. There is no easy way to quantify statements by the degree to which they represent “nationalistic” or “federalistic” views, and accordingly, I have had to draw somewhat arbitrary lines. Some Federalist arguments are susceptible to competing interpretations, and only a consideration of other statements and materials can shed light on the degree to which they truly were nationalistic. To take one example that I discuss in greater detail below,¹⁹⁶ the Federalists argued (without much interpretive disagreement from the Anti-Federalists) that unlike under the Articles of Confederation, which required Congress to rely on the states to implement national law, the new national government would have power directly over the people.¹⁹⁷ This argument is quite nationalistic in one sense, because it defends a grant of sovereign power to the national government; but if (as the majority on the Court has argued) the Federalists should also be understood to have argued implicitly that Congress would no longer enjoy the authority to use the states as intermediaries, then the argument is also federalistic, because it denies to the national government one means of implementing and enforcing federal law. To decide which category best fits this Federalist argument, I necessarily had to assume the conclusion to the question over which the Court has battled: that the Federalists in fact intended the argument to be nationalistic, not federalistic. With the exception of these difficulties at

195. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 109, at 24.

196. See *infra* notes 304–307 and accompanying text.

197. See, e.g., THE FEDERALIST NO. 15 (Alexander Hamilton).

the margin, however, it is generally not difficult to distinguish between statements that emphasized consolidation over federation (such as Randolph's) and statements that offered interpretations of the proposed Constitution that would preserve a larger role for the states (such as Madison's insistence in *The Federalist* that the states would retain "a residuary and inviolable sovereignty"¹⁹⁸).

Another difficulty stems from the nature of political argumentation. Although many of the statements that I have placed in this category almost certainly were offered by their authors in response to Anti-Federalist arguments, it is often impossible to know which were responsive to specific Anti-Federalist arguments, which were simply intended to characterize the Constitution in terms more palatable to a suspicious public, and which were genuine statements of belief about the intended meaning of the proposed Constitution. Although these difficulties of historical context present significant problems for a court attempting to discern the original understanding,¹⁹⁹ they are not particularly problematic for *this* study; the relevant data for purposes of this study are the majority's or dissent's simple choices between nationalistic or federalistic statements from the founding era.

It should not be surprising that statements by supporters of the Constitution vary in the depth of their support for a strong, consolidated union. There was a diversity of views even among the Constitution's proponents, and after the Philadelphia convention, the Federalists made a sustained effort to respond to Anti-Federalist criticisms not only to ensure ratification, but also to fix the original understanding according to their own views. As Professor Rakove explained, "the framers were involved in an effort not only to advance the arguments most likely to counter Anti-Federalist objections but to present as well their own understandings of the considerations that had prevailed at the Convention and their individual assessments of the Constitution."²⁰⁰ Federalist statements from the ratification period thus speak with something short of consensus.

B. Results

Careful consideration of the Court's pattern of citing founding-era views to discern the original understanding demonstrates that the Court's

198. THE FEDERALIST NO. 39 (James Madison).

199. See Eskridge, *supra* note 161, at 1309 ("The *Federalist* cannot be understood without exploring the larger historical context.").

200. RAKOVE, *supra* note 32, at 155.

current majority in federalism cases²⁰¹ gives substantially more weight than does the dissent²⁰² to Anti-Federalist views. The majority often cites Anti-Federalist views to suggest that the understanding of the Constitution as ratified accommodated Anti-Federalist concerns. When the dissent cites Anti-Federalist views, on the other hand, it does so exclusively to demonstrate that the Constitution was understood to mean precisely what the Anti-Federalists complained it meant. In other words, whereas the dissent consistently cites Anti-Federalist views to demonstrate that Anti-Federalist *fears* were realized at the ratification, the majority cites them to demonstrate that Anti-Federalist *hopes* (tempered as they may have been) were realized upon ratification. Table One reflects that the majority cited Anti-Federalist hopes as evidence of meaning twelve times, whereas it cited Anti-Federalist fears as evidence of meaning only three times; the dissent, on the other hand, never cited Anti-Federalist hopes as evidence of meaning (that is, never concluded that the Constitution was originally understood to accommodate Anti-Federalist views), but cited Anti-Federalist fears as evidence of meaning (that is, concluded that the Constitution meant precisely what the Anti-Federalists feared it would mean) twenty-seven times.

TABLE ONE: ANTI-FEDERALISTS' STATEMENTS

	Anti-Federalist <i>Hopes</i> Cited as Evidence of Meaning	Anti-Federalist <i>Fears</i> Cited as Evidence of Meaning
Majority	12	3
Dissent	0	27

To the extent that the majority relies on Federalist views in establishing the original understanding, it is substantially more likely than the dissent to cite Federalist statements that appear to have been made to allay Anti-Federalist fears about the power of the national government, or that (at a minimum) demonstrate more solicitude for state autonomy. Although the dissent often cites Federalist statements in this category to

201. I have included the following Justices in this group: William Rehnquist, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, Clarence Thomas, Lewis Powell, and Warren Burger.

202. I have included the following Justices in this group: David Souter, John Paul Stevens, Ruth Bader Ginsburg, Stephen Breyer, Harry Blackmun, Thurgood Marshall, William Brennan, Byron White, and William Douglas.

demonstrate the original understanding, it is just as likely to argue that these Federalist statements, although ostensibly expressing a more restrictive view of national power, should be read in context to indicate a more robustly nationalist view. Table Two reveals that the majority cited Federalists' statements demonstrating solicitude for state autonomy eighty-one times as evidence of original meaning, and never attempted to discount such statements by reading them narrowly in light of the context in which they were made. The dissent, conversely, sometimes cited such statements to reflect the original understanding (seventeen times), but more often argued that they should be read narrowly in light of the context in which they were made (thirty-one times).

TABLE TWO: FEDERALISTS' FEDERALISTIC STATEMENTS

	Cited as Authoritative Evidence of Meaning	Read Narrowly in Light of Context
Majority	81	0
Dissent	17	31

The dissent is substantially more likely than the majority to cite as evidence of the original understanding the more unabashedly nationalist views of Federalists. The majority, on the other hand, rarely cites these nationalistic statements as evidence of original meaning; instead, the majority either discounts these views as outside the framing mainstream, or reads them more narrowly or in a context that renders them more federalistic in nature. Table Three shows that the majority cited Federalists' robustly nationalist statements as evidence of the original understanding only eight times, whereas it discounted such statements as outside the framing the mainstream or read such statements narrowly in context sixty-three times. The dissent, on the other hand, cited such statements seventy-eight times as evidence of the original understanding, and never discounted them.

TABLE THREE: FEDERALISTS' NATIONALISTIC STATEMENTS

	Cited as Authoritative Evidence of Meaning	Discounted Because Nationalistic	Read Narrowly to Seem Less Nationalistic
Majority	8	7	56

Dissent	78	0	0
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Numerical summaries do not give a nuanced portrait of the Court's citation patterns; as explained above, context is everything in the categorization reflected in the tables. Accordingly, I discuss the findings in greater detail below.

1. Reliance on Anti-Federalist Views

In light of the nature of the ratification debate, the originalist must choose how to treat Anti-Federalist views. The originalist can plausibly argue that although the Anti-Federalists lost the war over whether the Constitution should be ratified, there is no reason to think that the Anti-Federalist lost every specific battle over how various provisions of the Constitution should be understood. Therefore, the originalist might choose to cite Anti-Federalist concerns about the meaning of the Constitution to demonstrate that the delegates at the state ratification conventions would never have voted to ratify the Constitution unless it accommodated their concerns.

This is not the originalist's only plausible treatment of Anti-Federalist views. Conversely, the originalist can argue that the Constitution was ratified *notwithstanding* the Anti-Federalists' frequently expressed disapproval of many provisions, and that their statements demonstrated their "understanding" of the Constitution. Thus, the originalist can argue that Anti-Federalist fears were realized upon ratification.²⁰³

The current Court's federalism majority has almost always followed the former approach,²⁰⁴ and the dissent has only followed the latter approach.

203. Generally the originalist cannot establish the original understanding without reference to the views of the Constitution's proponents as well, and it is impossible to assess the degree to which Anti-Federalist views represented the conventional understanding without considering the Federalists' responses. I discuss the Court's treatment of Federalist responses to Anti-Federalist arguments below. See *infra* Part III.B.2.

William Eskridge has argued that strategic statements by Anti-Federalists attacking the Constitution (that is, Anti-Federalist statements intended not to "fix" meaning but to defeat ratification) "are worth little in understanding the provision if it is adopted, because their incentives are to exaggerate and distort the meaning and effect of the provision." Eskridge, *supra* note 161, at 1318. He argues, however, that "responses by key supporters to opponents' attacks, such as *The Federalist* and sponsor colloquies in Congress, are potentially worth a great deal because of their strategic posture." *Id.*; see *infra* notes 240–242 and accompanying text.

204. See Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 645 (1995) ("In essence, the New Federalists seem to view the Constitution almost as if it was a compromise between those who drafted it and their opponents.").

In the state sovereign immunity cases, for example, the majority has cited Anti-Federalist fears that “the Constitution would make unconsenting States subject to suit in federal court” to demonstrate that the Constitution was *not* originally understood to permit such suits.²⁰⁵ In *Welch v. Texas Department of Highways and Public Transportation*,²⁰⁶ Justice Powell cited statements by Patrick Henry, George Mason, and Richard Henry Lee expressing that view, and concluded that the Constitution simply would not have been ratified had these Anti-Federalist fears not been allayed.²⁰⁷ Similarly, the majority has argued on more than one occasion that the Anti-Federalist-influenced amendments that several state conventions proposed upon ratification²⁰⁸ meant that the states would not have ratified the Constitution as proposed if it had not incorporated Anti-Federalist views on the immunity of states from suit.²⁰⁹

Justice Powell described the approach explicitly in his dissent in *Garcia v. San Antonio Metropolitan Transit Authority*,²¹⁰ one of the last federalism decisions in which the members of the current majority found themselves in dissent. The Court in *Garcia* held that Congress had the authority to require the states to pay a minimum wage to their employees; Justice Powell dissented, arguing that the Tenth Amendment precluded Congress from interfering with such internal state functions. He explained that “initial opposition to the Constitution was rooted in the fear that the National

205. *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 483 (1987) (holding that Congress did not express in unmistakable statutory language in the Jones Act its intention to abrogate the states’ Eleventh Amendment immunity).

206. 483 U.S. 468.

207. *Id.* at 483.

208. The state convention in Rhode Island, for example, declared upon ratification that “the judicial power of the United States, in cases in which a state may be a party, does not extend to criminal prosecutions, or to authorize any suit by any person against a state,” and sought an amendment “to remove all doubts or controversies respecting the same.” 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 336 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter DEBATES]. The New York convention issued a similar declaration. *Id.* at 327–29. These declarations and proposed amendments expressed (or responded to) Anti-Federalist concerns. See MAIN, *supra* note 91, at 248.

209. See *Alden v. Maine*, 527 U.S. 706, 718–19, 724–25 (1999); *Welch*, 483 U.S. at 483. The Court made clear in *Alden* that the proposed amendments were relevant to discerning the original understanding of the Constitution as *originally* proposed—that is, before the adoption of the Eleventh Amendment. See 527 U.S. at 718. The majority argued that the Anti-Federalist view of state sovereign immunity, embodied in the amendments proposed upon ratification in Rhode Island and New York, was incorporated into the Constitution even without the Eleventh Amendment. Cf. *id.* at 741 (arguing that Founders did not believe that Congress would have power to abrogate the states’ sovereign immunity, because otherwise the “well-known creativity, foresight, and vivid imagination of the Constitution’s opponents” would have produced an objection).

210. 469 U.S. 528 (1985).

Government would be too powerful and eventually would eliminate the States as viable political entities.”²¹¹ He cited the views of several prominent Anti-Federalists—including the comments of George Mason at the Virginia Convention and a polemic by Agrippa, a noted Anti-Federalist commentator—and the fact that several of the state conventions had, at the urging of Anti-Federalists, proposed amendments to make explicit a reservation of powers to the states.²¹²

Justice Thomas has been particularly aggressive in citing Anti-Federalist views. In his concurrence in *United States v. Lopez*,²¹³ for example, he cited the views of The Federal Farmer and Melancton Smith, a prominent New York Anti-Federalist, to demonstrate that “commerce” was originally understood to mean only bartering and selling of goods.²¹⁴ In his dissent in *U.S. Term Limits, Inc. v. Thornton*²¹⁵ (in which he was joined by all of the members of the current federalism majority except Justice Kennedy), Justice Thomas cited the views of George Mason to demonstrate that the founding generation understood the Qualifications Clauses²¹⁶ to create only a floor for requirements for federal representatives, not (as the majority contended) a ceiling.²¹⁷ Justice Thomas also relied in *Term Limits* on the views of Thomas Jefferson (who supported ratification but was

211. *Id.* at 568 (Powell, J., dissenting); see also Farber, *supra* note 204, at 645.

212. See *Garcia*, 469 U.S. at 568–69 (citing George Mason, ADDRESS IN THE RATIFYING CONVENTION OF VIRGINIA (1788), reprinted in ANTI-FEDERALISTS VERSUS FEDERALISTS 208, 208–09 (John D. Lewis ed., 1967); LETTERS OF AGRIPPA (1788), reprinted in 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 510, 511–13 (1971)). Justice Powell also cited a famous letter from Samuel Adams to Richard Henry Lee that reflected the predominant Anti-Federalist concerns. See *Garcia*, 469 U.S. at 568–69 (Powell, J., dissenting) (citing LETTER FROM SAMUEL ADAMS TO RICHARD HENRY LEE (Dec. 3, 1787), reprinted in ANTI-FEDERALISTS VERSUS FEDERALISTS, *supra*, at 159). Adams was more of a confederalist than a nationalist, and his views are closely identified with the Anti-Federalist cause. However, he ultimately supported ratification in Massachusetts. See Gillespie, *supra* note 168, at 138.

To be sure, there is a difference between arguing that Anti-Federalist concerns found voice in the provisions of the Constitution as originally enacted (as did the Court in *Welch* and *Alden*) and that Anti-Federalist concerns found voice in a provision (such as the Tenth Amendment) of the Bill of Rights, which is conventionally thought to be the Anti-Federalists’ lasting legacy in the Constitution. See, e.g., THE ESSENTIAL ANTIFEDERALIST, *supra* note 104, at ix. Justice Powell went one step further, arguing that because the Tenth Amendment incorporates Anti-Federalist views, it must do more than simply confirm the theory of enumerated powers, which even nationalist proponents of the Constitution conceded in the course of defending the Constitution. See *WILSON*, *supra* note 149, at 339–40.

213. 514 U.S. 549 (1995).

214. *Id.* at 585–86 (Thomas, J., concurring).

215. 514 U.S. 779 (1995).

216. U.S. CONST. art. I, § 2, cl.1; *id.* § 3, cl. 3.

217. *U.S. Term Limits*, 514 U.S. at 869–70.

sympathetic to Anti-Federalist concerns)²¹⁸ to demonstrate that the states retained authority to set additional qualifications for federal representatives.²¹⁹

The current federalism dissenters, on the other hand, have cited Anti-Federalist views only to demonstrate that the Constitution was understood to mean precisely what the Anti-Federalists feared it would mean.²²⁰ In the state sovereign immunity cases, for example, the dissenters have consistently cited Anti-Federalist fears that the Constitution would divest the states of immunity from suit to demonstrate that the Constitution in fact was originally understood either to divest the states of their immunity or (at a minimum) to authorize Congress to abrogate the states' immunity. The dissenters have, in a series of cases, cited such fears expressed by Patrick Henry,²²¹ George Mason,²²² Thomas Tredwell,²²³ The Federal

218. See, e.g., 4 DUMAS MALONE, *JEFFERSON AND HIS TIME: JEFFERSON THE PRESIDENT* 25–26 (1970); Powell, *supra* note 25, at 1363–64. Jefferson was an advocate of limited government, and he believed that “[t]he true theory of our Constitution is surely the wisest and best, that the States are independent as to everything within themselves, and united as to everything respecting foreign nations. Let the General Government be reduced to foreign concerns only” LETTER FROM THOMAS JEFFERSON TO GIDEON GRANGER (1800), *reprinted* in THOMAS JEFFERSON ON DEMOCRACY 30 (Saul K. Padover ed., 1939).

219. See *U.S. Term Limits*, 514 U.S. at 873–74, 913–14 n.37 (Thomas, J., dissenting).

220. The only arguable instance of the dissenters citing Anti-Federalist views as direct evidence of the Constitution's meaning is fully consistent with the dissenters' general approach of referring to Anti-Federalist *fears* as evidence of the original understanding. In *United States v. Morrison*, Justice Souter agreed with the majority that “the listing in the Constitution of some powers implies the exclusion of others unmentioned,” and he cited as evidence statements to that effect made by Federalists to argue that a bill of rights would be unnecessary. 529 U.S. 598, 638 & n.11 (2000) (Souter, J., dissenting) (citing THE FEDERALIST NOS. 45 (James Madison) and 84 (Alexander Hamilton); REMARKS OF JAMES WILSON AT THE PENNSYLVANIA CONVENTION, *reprinted* in 2 DEBATES, *supra* note 208, at 434, 436–37). Justice Souter then acknowledged that “[t]he Federalists did not, of course, prevail on this point” because “most States voted for the Constitution only after proposing amendments and the First Congress speedily adopted a Bill of Rights.” 529 U.S. at 638 n.11 (Souter, J., dissenting). Justice Souter thus agreed that Anti-Federalist views are embodied (at least at a high level of generality) in the Bill of Rights, but rejected the argument that Anti-Federalist views are embodied in provisions of the Constitution as originally adopted. *Id.*

221. See *Seminole Tribe v. Florida*, 517 U.S. 44, 142–43 (1996) (Souter, J., dissenting) (explaining that Henry opposed the Constitution in part because he believed that states would be suable in federal court even under diversity jurisdiction; cited to demonstrate either that Henry's fears were realized upon ratification or that there was a diversity of views at the founding); *id.* at 139–40 (Souter, J., dissenting) (explaining that Henry objected to the Constitution because it did not guarantee common-law protections of liberty; cited to demonstrate that the Constitution, as the Anti-Federalists argued, did not protect unenumerated common-law rights, including the “right” of state sovereign immunity); *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 505 (1987) (Brennan, J., dissenting) (noting that Henry thought states could be sued, and that he was “not persuaded by the rhetoric of Madison, Hamilton, and Marshall,” because the Virginia Convention “endorsed an amendment” that would have eliminated the citizen-state

Farmer,²²⁴ and Brutus.²²⁵ Similarly, the dissenters have cited the Anti-Federalist-inspired amendments proposed at several state ratification conventions that would have eliminated Article III's citizen-state diversity clause or made explicit protection for state sovereign immunity to demonstrate either that there was no consensus on the question of immunity at ratification,²²⁶ or that "the delegates did not believe that state sovereign immunity barred all suits against States."²²⁷

The dissenters have treated Anti-Federalist views the same way in other contexts. In *Printz v. United States*, Justice Stevens argued that the Constitution was originally understood to permit Congress to compel state officers to enforce federal law. In support, he cited statements by Brutus and Patrick Henry expressing concern over the potential for an overbearing presence of federal tax collectors,²²⁸ and a subsequent statement by Patrick Henry expressing concern that if it did not create a federal tax collecting force, Congress could simply order state officials to perform the task.²²⁹ Similarly, in *Term Limits*, Justice Stevens argued (for the majority) that the opposition of seven prominent Anti-Federalists to the Constitution on the

diversity clause); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 266 (1985) (Brennan, J., dissenting) (noting that Henry thought it clear that Article III subjected states to suit).

222. See *Seminole Tribe*, 517 U.S. at 138–39 (Souter, J., dissenting) (explaining that Mason objected to the Constitution in part because under it "the people would not be 'secured even in the enjoyment of the benefit of the common law'" (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 109, at 637)); *Welch*, 483 U.S. at 505 (Brennan, J., dissenting) (noting that Mason thought that the Constitution authorized individual suits against states); *Atascadero State Hosp.*, 473 U.S. at 264–65 (Brennan, J., dissenting) (noting that Mason expressed the view at the Virginia convention that Article III provided for jurisdiction over suits against states and would have the effect of abrogating immunity).

223. See *Seminole Tribe*, 517 U.S. at 139 n.35 (Souter, J., dissenting) (noting that Tredwell objected at the New York convention that the Constitution did not guarantee common-law protections of liberty).

224. See *Atascadero*, 473 U.S. at 271–72 (Brennan, J., dissenting) (quoting at length from an essay by the Federal Farmer complaining that Article III subjected states to suit in federal court).

225. See *id.* at 273 (Brennan, J., dissenting) (noting that Brutus thought that Article III subjected states to suit in federal court, and that he objected as a result).

226. See *Alden v. Maine*, 527 U.S. 706, 778–81 (1999) (Souter, J., dissenting) ("[T]he state ratifying conventions' felt need for clarification on the question of state suability demonstrates that uncertainty surrounded the matter even at the moment of ratification.").

227. *Welch*, 483 U.S. at 505 (Brennan, J., dissenting); accord *Atascadero*, 473 U.S. at 278 n.28 (Brennan, J., dissenting) ("[T]he delegates to these conventions did not find such a limitation in Article III itself.").

228. *Printz v. United States*, 521 U.S. 898, 946 n.5 (1997) (Stevens, J., dissenting).

229. See *id.* at 947 n.6 (Stevens, J., dissenting). Federalists responded to Brutus's and Henry's initial concern about an overbearing federal tax collection force by arguing that Congress would simply rely on state officers to collect federal taxes, see THE FEDERALIST NO. 27 (Alexander Hamilton), a suggestion that did little to allay Henry's concerns about excessive national power.

ground that it did not include a requirement that federal representatives “rotate” in office—that is, that federal representatives be forced to relinquish office after a certain term—confirmed that the Constitution not only did not *require* rotation, but also did not *permit* a state to impose an analogous requirement.²³⁰ In addition, the majority in *Term Limits* argued that Anti-Federalist-inspired amendments proposed by the New York, Virginia, and North Carolina ratification conventions to limit the terms of federal representatives demonstrate that the Constitution that those states *did* ratify did *not* set term limits.²³¹

A member of the federalism majority has cited Anti-Federalist statements to demonstrate that the Anti-Federalists’ fears were realized by ratification only once,²³² and it was, perhaps fittingly, to support an argument that a different constitutional provision should be read in a manner more solicitous of state autonomy. In his dissent in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*,²³³ Justice Thomas noted that Brutus and other prominent Anti-Federalists were concerned that Article I, section ten’s prohibition of state duties on imports or exports would leave states with direct taxation as the only way of raising revenue.²³⁴ Justice Thomas concluded that these Anti-Federalist fears (although perhaps exaggerated) were realized upon ratification, and further argued that

230. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 812–13 & n.23 (1995) (citing Melancton Smith and George Livingstone at the New York convention; Turner and Kingsley at the Massachusetts convention; and letters by Samuel Bryan (Centinel I), G.L. Turberville, and Mercy Otis Warren (A Columbian Patriot)); cf. *id.* at 812 n.22 (noting that delegates to the Philadelphia convention defeated a proposal requiring rotation); *id.* at 813 n.24 (noting that Thomas Jefferson expressed concern about the absence of a rotation requirement).

231. *Id.* at 813–15 & n.25.

232. The majority has, on occasion, acknowledged that not all Anti-Federalist arguments found a receptive audience. In *Printz*, for example, Justice Scalia responded to the dissent’s suggestion that European federalism considers federal commands to individual states to be consistent with notions of state autonomy, see *Printz*, 521 U.S. at 976–78 (Breyer, J., dissenting), by noting that Patrick Henry had unsuccessfully argued at the Virginia convention that Switzerland’s confederacy proved that the Constitution’s consolidation was unnecessary, see *id.* at 921 n.11. Justice Scalia cited Henry (along with Madison’s and Hamilton’s discussions in *The Federalist* of other nations’ systems) to demonstrate merely that “our federalism is not Europe’s.” *Id.*

233. 520 U.S. 564 (1997).

234. *Id.* at 631–33 & n.16 (Thomas, J., dissenting) (citing BRUTUS 1 (Oct. 18, 1787) in 13 DOCUMENTARY HISTORY, *supra* note 149, at 415; JOHN QUINCY ADAMS TO WILLIAM CRANCH (Oct. 14, 1787), in 14 DOCUMENTARY HISTORY, *supra* note 149, at 222; GEORGE LEE TURBERVILLE TO JAMES MADISON (Dec. 11, 1787), in 14 DOCUMENTARY HISTORY, *supra* note 149, at 407; A FEDERAL REPUBLICAN, A REVIEW OF THE CONSTITUTION BY THE LATE CONVENTION (Oct. 28, 1787), in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 117, at 79; Vox Populi, MASSACHUSETTS GAZETTE, Oct.–Nov. 1787, in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 117, at 47).

because the clause was originally understood to be the Constitution's only limitation on state authority over interstate and foreign trade, the "dormant commerce clause"²³⁵ doctrine is an unwarranted and unduly broad restriction on state power.²³⁶

2. Reliance on Federalists' Federalistic Statements

In *Missouri v. Jenkins*,²³⁷ Justice Thomas explained in his concurring opinion that "[w]hen an [Anti-Federalist] attack on the Constitution is followed by an open Federalist effort to narrow the provision"—what Justice Thomas referred to as a Federalist attempt to "sell" the provision to the public—"the appropriate conclusion is that the drafters and ratifiers of the Constitution approved the more limited construction offered in response."²³⁸ The dispute in *Jenkins*—whether a district court had exceeded its authority in requiring salary increases for school employees and increased funding for education programs as a means to desegregate Kansas City's schools²³⁹—was as much about the separation of powers (that is, the power of the federal *judiciary* to impose remedies on states for constitutional violations) as it was about federalism. But Justice Thomas and the other members of the federalism majority have followed this approach (albeit without a specific roadmap such as the one that Justice Thomas provided in *Jenkins*) in pure federalism cases, as well.

William Eskridge has tentatively endorsed²⁴⁰ the propriety of this approach. In comparing reliance on *The Federalist* in constitutional interpretation to reliance on legislative history in statutory interpretation, he explained that responses by Federalists to Anti-Federalist arguments against ratification

are potentially worth a great deal because of their strategic posture. When key supporters respond to attacks, they are motivated to win over undecided players, without alienating fellow supporters of the measure. Thus, the key players seek out enough common ground that

235. Since *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), the Court has interpreted the affirmative grant of power to Congress to regulate interstate commerce to imply a limitation on the power of the states over the same subject. See generally 1 *TRIBE*, *supra* note 189, at 1029–1102.

236. See *Camps Newfound/Owatonna*, 520 U.S. at 610 (Thomas, J., dissenting).

237. 515 U.S. 70 (1995).

238. *Id.* at 126 (Thomas, J., concurring) (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 367 (1995) (Thomas, J., concurring)).

239. 515 U.S. at 73.

240. Professor Eskridge has criticized the originalist approach to statutory interpretation. See William N. Eskridge, Jr., *The New Textualism*, 37 *UCLA L. REV.* 621 (1990); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 *U. PA. L. REV.* 1479 (1987).

the proposed measure will garner majority support. Opponents are alert to any potential inconsistency between the sponsors' statements and the plain meaning of the proposed measure.²⁴¹

Therefore, the more tempered (and less nationalistic) statements in *The Federalist*, Eskridge argued, helped to "persuade[] fence-sitters" and "provide a firmer basis for understanding . . . the Constitution that was ultimately adopted."²⁴² The argument applies equally to statements at the state ratification conventions by the Constitution's supporters.

One must, however, take statements of political persuasion with a grain of salt. Because *The Federalist* is "a piece of political advocacy"—and an anonymous one at that—its "contents may at times reflect the exigencies of the debate, rather than a dispassionate account of constitutional meaning."²⁴³ Accordingly, John Manning has argued that "[h]owever revered it may have become in retrospect,"²⁴⁴ *The Federalist* is of limited value "as a window into the reasonable ratifier's likely understanding."²⁴⁵ This is not to say that *The Federalist* is irrelevant to the search for the original understanding; Manning's argument does suggest that some Federalist statements designed to respond to Anti-Federalist concerns do not, in and of themselves, reflect the original understanding. This is especially so when one considers that the Federalists made numerous statements in other contexts that ascribed a more nationalistic meaning to various provisions of the proposed Constitution.

I do not intend to suggest which approach to the Federalists' more federalistic statements ought to govern the search for original meaning. The brief discussion above demonstrates that there is merit to both approaches, assuming one accepts that originalism is the appropriate interpretive methodology. Instead, I describe the competing approaches merely to preface the discussion of the way in which the competing blocs on the Court have cited such statements.

As noted above, the majority consistently follows the former approach. Indeed, the majority cited federalistic statements by Federalists eighty-one times as evidence of the original understanding, and did not discount such statements even once; state sovereign immunity cases illustrate this trend. The majority has repeatedly cited the comments of James Madison and

241. Eskridge, *supra* note 161, at 1318.

242. *Id.* at 1319.

243. Manning, *supra* note 14, at 1339.

244. *Id.* at 1351.

245. *Id.* at 1354.

John Marshall²⁴⁶ at the Virginia convention and Alexander Hamilton in *The Federalist* No. 81²⁴⁷ to demonstrate that the Constitution was originally understood to incorporate (and preserve inviolate) the principle of state sovereign immunity. Madison and Marshall made their statements in direct response to Anti-Federalist arguments that the citizen-state diversity clause

246. At the Virginia ratifying convention, George Mason argued that Article III's citizen-state diversity clause appeared plainly to permit individuals' suits against states, a state of affairs that he found intolerable. See 3 DEBATES, *supra* note 208, at 526–27. James Madison responded by arguing:

Its jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. . . . It appears to me that [the citizen-state diversity clause] can have no operation but this—to give a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it.

Id. at 533. Anti-Federalists reacted to Madison's statement with incredulity, suggesting that Madison's defense was inconsistent with the plain language of the clause. John Marshall took the floor to defend Madison's view:

With respect to disputes between *a state and the citizens of another state*, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a state cannot be defendant. . . . It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff.

Id. at 555–56. When the Virginia convention ratified the Constitution, it proposed an amendment to clarify that the states would enjoy immunity from suit. See *id.* at 660–61 (proposing a revised Article III that did not provide for jurisdiction over controversies between states and citizens of other states).

247. Alexander Hamilton offered a similar reading of Article III in THE FEDERALIST NO. 81, one of the most frequently cited *Federalist Papers*. See Lupu, *supra* note 160, at 406 (explaining that THE FEDERALIST NO. 81 is the third most-cited *Federalist Paper*, appearing in twenty-seven Supreme Court decisions). Hamilton argued:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal. . . . [T]here is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a preexisting right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.

of Article III subjected states to suits by individuals. Hamilton seems to have written his essay, initially intended to shape the debate over ratification in New York, to respond to similar concerns. These statements together account for almost one-third of the majority's citations in this category²⁴⁸ and two-thirds of the citations in this category that the dissenters have discounted by reference to context.²⁴⁹

The Court first offered these statements by Madison, Marshall, and Hamilton as a justification for judicial recognition of state sovereign immunity in 1890 in *Hans v. Louisiana*,²⁵⁰ and the Court has continued to cite them in all of its most recent state sovereign immunity cases. In *Alden v. Maine*,²⁵¹ the Court stressed that Madison's, Marshall's, and Hamilton's views (which the Court cited, collectively, five times) represent the "original understanding of the Constitution" in large part because the trio were the "leading advocates" of the Constitution's ratification.²⁵² Similarly, in *Welch*, the Court insisted that in light of Anti-Federalist fears about the prospect of state amenability to suit, "the representations of Madison,

THE FEDERALIST NO. 81 (Alexander Hamilton).

248. Twenty-five of the majority's eighty-one citations in this category were to the comments of Madison, Marshall, and Hamilton about state sovereign immunity. Specifically, the Court cited some or all of these statements in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 752 (2002) (citing THE FEDERALIST NO. 81 (Alexander Hamilton)), *Alden v. Maine*, 527 U.S. 706, 716–18 (1999) (citing comments of Madison, Marshall, and Hamilton), *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997) (citing THE FEDERALIST NO. 81 (Alexander Hamilton)), *Seminole Tribe v. Florida*, 517 U.S. 44, 69–70 nn. 12–13 (1996) (citing comments of Hamilton, Madison, and Marshall), *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 780 n.1 (1991) (citing comments of Madison, Marshall, and Hamilton), *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 480–83 & n.10 (1987) (citing comments of Madison, Marshall, and Hamilton), and *Edelman v. Jordan*, 415 U.S. 651, 660 n.9 (1974) (citing comments of Madison, Marshall, and Hamilton). In addition, Justice Rehnquist and Justice Powell cited the statements in their respective dissents in *Nevada v. Hall*, 440 U.S. 410, 435–36 & n.3 (1979) (Rehnquist, J., dissenting), and *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 526–27 (1982) (Powell, J., dissenting).

249. Twenty-one of the dissenters' thirty-one citations in this category were to the comments by Madison, Marshall, and Hamilton about state sovereign immunity. See *Alden*, 527 U.S. at 773–75 (Souter, J., dissenting); *Seminole Tribe*, 517 U.S. at 143–49 (Souter, J., dissenting); *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 310 n.4 (1990) (Brennan, J., concurring); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19 (1989) (opinion of Brennan, J.), *overruled by Coeur d'Alene Tribe*, 521 U.S. 261; *Welch*, 483 U.S. at 505–09 (Brennan, J., dissenting); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 265–80 (1985) (Brennan, J., dissenting); *Employees of the Dep't of Pub. Health and Welfare v. Dep't of Pub. Health and Welfare*, 411 U.S. 279, 316–17 (1973) (Brennan, J., dissenting); *id.* at 292 n.7 (Marshall, J., concurring).

250. 134 U.S. 1, 12–15 (1890); see also *Principality of Monaco v. Mississippi*, 292 U.S. 313, 323–25 (1934).

251. 527 U.S. 706 (1999).

252. *Id.* at 727–28.

Hamilton, and Marshall . . . may have been essential to ratification.”²⁵³ Then—Associate Justice Rehnquist advanced the same claim in his dissent in *Nevada v. Hall*, noting that Madison, Marshall, and Hamilton “repeatedly assured opponents of the Constitution, such as Patrick Henry, that the sovereign immunity of the States was secure,” and argued:

[a]lthough there were those other than opponents of the Constitution who suggested that Art. III was an abrogation of state sovereign immunity—Edmund Randolph and James Wilson being the most eminent—this Court has consistently taken the views of Madison, Marshall, and Hamilton as capturing the true intent of the Framers.²⁵⁴

The dissenters, on the other hand, have argued that these same statements by Madison, Marshall, and Hamilton must be read in context, for it is the context that reveals that such statements were intended to suggest only that nothing in Article III would eliminate the state-law immunity that states would enjoy in suits brought under the citizen-state diversity clause, suits that (they assumed) would be governed by state law. Justice Souter argued in his dissent in *Alden* that Hamilton’s discussion in *The Federalist* No. 81 of suits against states to recover debts reveals that Hamilton intended to address only diversity suits.²⁵⁵ Similarly, in his dissent in *Seminole Tribe*, Justice Souter relied on Hamilton’s suggestion in *The Federalist* No. 32 that delegations of power to the national government (such as the power to regulate interstate commerce) would result in a concomitant “alienation” of the rights of sovereignty that the states had enjoyed before ratification (such as immunity from suit)²⁵⁶ to argue that Hamilton must have been referring in No. 81 only to diversity suits.²⁵⁷ Justice Brennan made similar arguments about No. 81 in his concurring and dissenting opinions in *Feeney*,²⁵⁸ *Atascadero*,²⁵⁹ and *Welch*,²⁶⁰ adding that *The*

253. *Welch*, 483 U.S. at 483.

254. *Nevada v. Hall*, 440 U.S. 410, 436 n.3 (1979) (Rehnquist, J., dissenting); see also *Edelman v. Jordan*, 415 U.S. 651, 660 n.9 (1974) (arguing that the statements of Madison, Marshall, and Hamilton represented “the prevailing view at the time of the ratification”).

255. See *Alden*, 527 U.S. at 773 n.13 (Souter, J., dissenting).

256. THE FEDERALIST NO. 32 (Alexander Hamilton).

257. *Seminole Tribe v. Florida*, 517 U.S. 44, 144–49 (1996) (Souter, J., dissenting).

258. 495 U.S. 299, 310 n.4 (1990) (Brennan, J., concurring) (arguing that Hamilton’s discussion applied only to diversity jurisdiction: “He used it in a passage reassuring States, which might have been concerned with the securities they issued and might not have wished to honor, that the grant of diversity jurisdiction in Article III would not annul their defense of sovereign immunity should they be sued in federal court under state law on a writ of debt.”).

259. 473 U.S. 234, 275–78 & n.25 (1985) (Brennan, J., dissenting) (arguing that THE FEDERALIST NO. 81 (Alexander Hamilton) should be read along with NOS. 32 and 80 (Alexander

Federalist No. 80 also suggested that Hamilton believed that Congress had authority to abrogate the states' immunity in federal question cases.²⁶¹ The dissenters have given similar treatment to Madison's and Marshall's comments at the Virginia Convention,²⁶² and Justice Brennan exemplified the approach when he noted that "[t]heir fervent desire for ratification could have led them to downplay the features of the new document that were arousing controversy."²⁶³

The respective approaches of the majority and the dissent to founding-era views on state sovereign immunity are representative of their approaches to federalistic statements by the Constitution's supporters in other contexts. Consider the treatment of *The Federalist* Nos. 39 and 45. In No. 39, Madison famously sought "to ascertain the real character of the government" created by the Constitution; he argued that it was in some respects federal—that is, in the nature of a confederacy—and in some respects national.²⁶⁴ The essay clearly was a response to Anti-Federalist arguments that the proposed government would be an unwarranted consolidation of power; indeed, Madison refers directly to the claims of the Constitution's opponents.²⁶⁵ The federalism majority regularly cites one particularly federalistic passage from No. 39: Madison's argument that the national government's "jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."²⁶⁶ The dissenters, in contrast, have cited No. 39

Hamilton) to mean that sovereign immunity would be a valid defense in state-law diversity suits in federal court, but not when the source of the claim is federal law).

260. 483 U.S. 468, 511–13 (1987) (Brennan, J., dissenting) (arguing that "context" for Hamilton's comments in THE FEDERALIST NO. 81 was the states' liability for debts that arose under state law).

261. See THE FEDERALIST NO. 80 (Alexander Hamilton) ("If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative may be ranked among the number.").

262. See *Alden v. Maine*, 527 U.S. 706, 775–78 (1999) (Souter, J., dissenting); *Seminole Tribe*, 517 U.S. at 143 n.39 (Souter, J., dissenting); *Welch*, 483 U.S. at 504–09 (Brennan, J., dissenting); *Atascadero*, 473 U.S. at 268 (Brennan, J., dissenting).

263. *Atascadero*, 473 U.S. at 270 n.20 (Brennan, J., dissenting).

264. THE FEDERALIST NO. 39 (James Madison).

265. *Id.* at 245 ("[T]he operation of the government on the people in their individual capacities, in its ordinary and most essential proceedings, will, in the sense of its opponents, on the whole, designate it, in this relation, a national government.").

266. *Id.* The majority has cited THE FEDERALIST NO. 39 for this point nine times in its recent federalism decisions. See *Fed. Mar. Comm'n v. S.C. State Ports Authority*, 535 U.S. 743, 751 (2002); *Alden*, 527 U.S. at 714, 715; *Printz v. United States*, 521 U.S. 898, 919, 921 (1997); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting); *New York v. United States*, 505 U.S. 144, 188 (1992); *Atascadero*, 473 U.S. at 238 n.2; *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 570 (1985) (Powell, J., dissenting).

only once (in Justice Blackmun's opinion for the Court in *Garcia*), to suggest that protection "for the States' 'residuary and inviolable sovereignty'" lies not in federal courts but "in the shape of the constitutional scheme."²⁶⁷ The same pattern holds for citations to *The Federalist* No. 45, in which Madison continued his argument that the states would enjoy substantial authority under the proposed Constitution. The majority has cited Madison's argument that the powers "which are to remain in the State governments are numerous and indefinite"²⁶⁸ five times;²⁶⁹ the dissenters have never cited the passage, although they have cited other portions of the paper.²⁷⁰ The pattern holds with respect to other commonly cited *Federalist Papers*.²⁷¹

267. *Garcia*, 469 U.S. at 550. In Justice Ginsburg's dissenting opinion in *Bush v. Gore*, she cited NO. 39 for the proposition that solicitude to the state legislature's role in the selection of the President should not obscure the role of the state itself in the process. 531 U.S. 98, 142 n.3 (2000) (Ginsburg, J., dissenting). Although several questions of federalism lurked in the background in *Bush*, I did not count it in my study. In any event, Justice Ginsburg's cite to THE FEDERALIST NO. 39 was not to support a claim of state autonomy over federal supremacy, but rather was intended to support an argument about intra-state authority. In addition, Justice Kennedy cited NO. 39 in his concurring opinion in *Term Limits*, see 514 U.S. at 841, but Justice Kennedy is (with this exception) a member of what I have called the federalism majority.

268. THE FEDERALIST NO. 45 (James Madison).

269. See *United States v. Lopez*, 514 U.S. 549, 552 (1995); *Gregory v. Ashcroft*, 501 U.S. 452, 457–58 (1991); *Garcia*, 469 U.S. at 570–71 (Powell, J., dissenting); *id.* at 582 (O'Connor, J., dissenting); *Atascadero*, 473 U.S. at 238 n.2.

270. Justice Brennan cited NO. 45 in his dissent in *National League of Cities v. Usery* to argue that the states are protected by the structure of the federal government. 426 U.S. 833, 876 (1976) (Brennan, J., dissenting) *overruled by Garcia*, 469 U.S. 528. In *Printz*, both Justice Souter and Justice Stevens cited a different portion of NO. 45 to argue that Madison stated the conventional understanding when he argued that the national government could use state officers to collect federal taxes. 521 U.S. at 974 (Souter, J., dissenting); *id.* at 947, 959 (Stevens, J., dissenting). Justice Scalia cited the same passage in his majority opinion in *Printz*, but read it more narrowly than the dissenters, *id.* at 910–11, and Justice Thomas cited the paper generically in his concurrence in *Lopez* to support his view that Congress lacks power to regulate activities that substantially affect commerce, *Lopez*, 514 U.S. at 592–93 (Thomas, J., concurring). The majority has never cited Madison's statement in NO. 45 that "as far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter." THE FEDERALIST NO. 45 (James Madison).

271. The majority has cited THE FEDERALIST NO. 17 (Alexander Hamilton) four times, see *Garcia*, 469 U.S. at 571 (Powell, J., dissenting); *id.* at 582 (O'Connor, J., dissenting); *Atascadero*, 473 U.S. at 238 n.2; *Lopez*, 514 U.S. at 591 (Thomas, J., concurring), and NO. 46 (James Madison) three times, see *Garcia*, 469 U.S. at 571, 575 n.18 (Powell, J., dissenting); *Atascadero*, 473 U.S. at 238 n.2, for the proposition that "[t]he Framers recognized that the most effective democracy occurs at local levels of government, where people with firsthand knowledge of local problems have more ready access to public officials responsible for dealing with them," *Garcia*, 469 U.S. at 575 n.18 (Powell, J., dissenting). The majority has not cited other portions of *The Federalist* that suggest that (at least Hamilton) did not see this virtue as an argument for judicial intervention to protect state autonomy. In NO. 27, for example, Hamilton argued that the federal government would attain the primary loyalty of the people if it were better administered than the

Finally, consider the Court's treatment of *The Federalist* Nos. 51 and 28, in which Madison and Hamilton respectively argued that the separation of powers and the structure of the federal union (or, in Madison's words, the "compound Republic") would protect the rights of the people. As Madison explained:

the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.²⁷²

The majority has cited the relevant passages of Nos. 51 and 28 eight times to support judicial intervention to protect the states.²⁷³ The dissenters, on the other hand, have never cited (in a federalism case) the relevant passages from either paper,²⁷⁴ even though such passages arguably support

state governments, see THE FEDERALIST NO. 27 (Alexander Hamilton), which Madison plainly thought was likely, see *STORING*, *supra* note 89, at 41. Indeed, Hamilton made clear in NO. 17 that the people would reward the state governments with their loyalty only if those governments "administer their affairs with uprightness and prudence." THE FEDERALIST NO. 17 (Alexander Hamilton).

272. THE FEDERALIST NO. 51 (James Madison). Hamilton made the same argument in NO. 28:

[I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.

THE FEDERALIST NO. 28 (Alexander Hamilton).

273. See *Printz*, 521 U.S. at 922 (citing THE FEDERALIST NO. 51 (James Madison) and NO. 28 (Alexander Hamilton)); *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring) (citing THE FEDERALIST NO. 51 twice); *New York v. United States*, 505 U.S. 144, 181–82 (1992) (citing THE FEDERALIST NO. 51); *Gregory*, 501 U.S. at 458–59 (citing THE FEDERALIST NOS. 28 and 51); *Garcia*, 469 U.S. at 582 (O'Connor, J., dissenting) (citing THE FEDERALIST NO. 51); cf. *Lopez*, 514 U.S. at 601 n.9 (Thomas, J., concurring) (citing THE FEDERALIST NO. 78 (Alexander Hamilton) as support for the power of the Court to review federal law to protect state sovereignty); *Garcia*, 469 U.S. at 567 (Powell, J., dissenting) (same).

274. Justice Blackmun referred to NO. 51 in his dissent in *Coleman v. Thompson* (a habeas case), but he cited a very different passage—Madison's statement that "[j]ustice is the end of government. It is the end of civil society." 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting) (quoting THE FEDERALIST NO. 51) (James Madison). In addition, Justice Brennan cited different portions of NO. 51 in two First Amendment cases. See *Larson v. Valente*, 456 U.S. 228, 245 n.22 (1982) (free exercise of religion); *Brown v. Hartlage*, 456 U.S. 45, 56 n.7 (1982) (freedom of speech).

the dissenters' view that the courts have at most a limited role in protecting state autonomy.²⁷⁵

Although the dissent has cited Federalist responses to Anti-Federalist concerns as authoritative evidence of the original understanding, it has generally done so only when the Federalist response supported a more expansive conception of federal power. For example, both Justices Stevens and Souter relied on Hamilton's (in *The Federalist* No. 36) and Madison's (in *The Federalist* No. 45) responses to Anti-Federalist fears that the national government's taxing power would lead to an overbearing army of federal tax collections officers. Madison and Hamilton attempted to allay Anti-Federalist fears by suggesting that the national government would rely on state officers to implement federal law.²⁷⁶ The dissenters cited these statements to demonstrate that the founding generation understood that Congress had the authority to require state officials to enforce federal law.²⁷⁷ Similarly, in his dissent in *Seminole Tribe*, Justice Souter credited as indicative of the original understanding Marshall's responses to Anti-Federalist arguments that Article III was unduly broad. Marshall attempted to meet Anti-Federalist objections by emphasizing the limited powers of the national government,²⁷⁸ but Justice Souter cited this federalistic defense to support his view that the Constitution did not render immutable the common law doctrine of sovereign immunity.²⁷⁹

275. See *Garcia*, 469 U.S. at 551–53; *Lopez*, 514 U.S. at 604 (Souter, J., dissenting).

276. Hamilton wrote:

Many specters have been raised out of this power of internal taxation to excite the apprehensions of the people . . . [T]he probability is that the United States will either wholly abstain from the objects preoccupied for local purposes, or will make use of the State officers and State regulations for collecting the additional imposition.

THE FEDERALIST NO. 36 (Alexander Hamilton); see also *id.* NO. 45, at 292 (James Madison) ("If the federal government is to have collectors of revenue, the State governments will have theirs also. . . . [I]t is probable that . . . the eventual collection, under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States."). Madison's and Hamilton's responses did little to assure Patrick Henry. See 3 DEBATES, *supra* note 208, at 167–68.

277. See *Printz*, 521 U.S. at 946–47, 959 (Stevens, J., dissenting); *id.* at 974 (Souter, J., dissenting). Justices Stevens and Souter also cited THE FEDERALIST NO. 27 (Alexander Hamilton), see 521 U.S. at 947–48 (Stevens, J., dissenting); *id.* at 971–75 (Souter, J., dissenting), and Justice Souter also cited NO. 44 (James Madison), see 521 U.S. at 972–73.

278. See *Seminole Tribe v. Florida*, 517 U.S. 44, 140–41 (1996) (Souter, J., dissenting) (citing 3 DEBATES, *supra* note 208, at 553).

279. Justice Souter argued that Marshall's response "assumes no generalized reception of English common law as federal law; otherwise, 'arising under' jurisdiction would have extended to any subject comprehended by the general common law." 517 U.S. at 141 (Souter, J., dissenting); see also *id.* at 139 (noting statements of George Nicholas, Edmund Randolph, and Edmund Pendleton at the Virginia convention agreeing with Anti-Federalists that the Constitution did

The dissent has been more likely to read Federalist statements responding to Anti-Federalist concerns as it has in the cases addressing state sovereign immunity; that is, narrowly, either by invoking context or by citing other statements by the same authors that are even more unabashedly nationalistic. For example, in *Term Limits*, Justice Stevens cited *The Federalist* NO. 32, which explained that the states would “retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States,”²⁸⁰ to support the argument that the states cannot “reserve” a power that did not exist before the ratification (such as the power to set qualifications for federal office holders in a newly created national government).²⁸¹ Justice Brennan turned Hamilton’s defense of the theory of enumerated powers (in *The Federalist* No. 31) against a rule protecting integral state functions from federal regulations by noting that Hamilton believed that the federal government was limited in the exercise of its enumerated powers only by “regard to the public good and to the sense of the people.”²⁸² Similarly, in *Garcia*, Justice Blackmun argued that Madison, by assuring that the states would retain a “residuary sovereignty,”²⁸³ meant that the states’ sovereignty would be secured solely through “the workings of the National Government itself,” not by “judicially created limitations on federal power.”²⁸⁴

3. Reliance on Federalists’ Nationalistic Statements

The differences between the majority and the dissenters are most pronounced in their respective treatment of the more robustly nationalistic statements of the Federalists during the founding era. The dissent has cited such statements seventy-eight times, all as evidence of the original understanding. Of the majority’s seventy-one citations to such statements, only eight were offered as evidence of the original understanding; of the remaining sixty-three, the majority discounted seven as representing views

not import common protections because that would make them immutable) (citing 3 DEBATES, *supra* note 208, at 451, 469–70, 550).

280. THE FEDERALIST NO. 32 (Alexander Hamilton).

281. U.S. *Term Limits, Inc. v. Thornton*, 514 U.S. 779, 801–02 (1995).

282. *Nat’l League of Cities v. Usery*, 426 U.S. 833, 857 n.1 (1976) (Brennan, J., dissenting) (quoting THE FEDERALIST NO. 31 (Alexander Hamilton), *overruled by Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985)).

283. *Garcia*, 469 U.S. at 550–52 (quoting THE FEDERALIST NO. 43 (James Madison)).

284. *Garcia*, 469 U.S. at 552; *accord Usery*, 426 U.S. at 876 (Brennan, J., dissenting) (citing THE FEDERALIST NOS. 45 and 46 (James Madison) to demonstrate that Madison believed that the structure of the national government would protect state sovereignty).

that were outside the framing mainstream, and read fifty-six narrowly to seem less nationalistic.

For example, the dissent has often cited the views of James Wilson²⁸⁵ and Edmund Randolph²⁸⁶ as evidence of the original understanding of state sovereign immunity. In his dissents in *Alden*²⁸⁷ and *Seminole Tribe*,²⁸⁸ Justice Souter collectively cited Wilson's and Randolph's views seven times; Justice Brennan cited them as well in his dissent in *Atascadero*.²⁸⁹ The majority, on the other hand, has argued that Wilson's and Randolph's views represent "a radical nationalist vision of the constitutional design that not only deviated from the views that prevailed at the time but . . . remains startling even today."²⁹⁰ The majority has also stated that Randolph and Wilson were part of a "small minority" whose "views were in tension with the traditional understanding of sovereign immunity,"²⁹¹ and argued that the purported views of Madison, Marshall, and Hamilton on sovereign immunity represent the "true intent of the Framers."²⁹²

Conversely, although the dissenters have relied on context to limit the meaning of Hamilton's, Madison's, and Marshall's statements about sovereign immunity, they have cited other statements by the trio suggesting

285. As the historian Gordon Wood has explained, Wilson "[m]ore boldly and fully than anyone else . . . developed the argument that would eventually become the basis of all Federalist thinking" about sovereignty. WOOD, *supra* note 90, at 530.

286. Although Randolph was not a consistent nationalist voice—he refused to sign the Constitution at the end of the Philadelphia convention and had a brief flirtation with the Anti-Federalist cause before rejoining the Federalists at the Virginia convention, see RAKOVE, *supra* note 32, at 106–08, 122–23—he believed that Article III authorized jurisdiction over suits by individuals against states, and maintained that position not only at the Virginia convention, see 3 DEBATES, *supra* note 208, at 207, 573–75, but also as Attorney General and counsel for the plaintiff in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419–20 (1793). (Fortunately for Randolph, James Wilson was a Justice on the Supreme Court when the Court decided *Chisholm*, which held that there was jurisdiction over an individual suit for money damages against Georgia. *Id.* at 466.) Randolph had his nationalist moments at the Philadelphia convention, as well: It was he who proposed the Virginia Plan to create not "a federal government" but rather "a strong consolidated union, in which the idea of states should be nearly annihilated." 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 109, at 24.

287. *Alden v. Maine*, 527 U.S. 706, 772 n.12; *id.* at 775–78 (1999) (Souter, J., dissenting). Justice Souter also cited similar views of Charles Pinckney at the South Carolina convention. See *id.* at 777 n.17.

288. *Seminole Tribe v. Florida*, 517 U.S. 44, 105 n.4, 139, 143 & n.38, 151–52 & n.45, 163 n.57 (1996) (Souter, J., dissenting).

289. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 268–69, 270 n.22 (1989) (Brennan, J., dissenting).

290. *Alden*, 527 U.S. at 725.

291. *Id.* at 725–26.

292. *Nevada v. Hall*, 440 U.S. 410, 436 n.3 (1979) (Rehnquist, J., dissenting); *accord* *Welch v. Tex. Dep't of Highways and Pub. Transp.*, 483 U.S. at 482–84 (1987) (acknowledging Randolph's and Wilson's views, but arguing that they did not represent the consensus view).

that they believed that Congress would have authority to subject states to suit for violations of federal law. The dissenters have read Hamilton's statements in *The Federalist* No. 80 as evidence that the Constitution was originally understood to authorize jurisdiction over states that violated federal rights,²⁹³ and they have read other comments by Madison and Marshall as evidence that the states' common law immunity would not be rendered immutable by ratification.²⁹⁴ Although the majority has argued that Hamilton's, Marshall's, and Madison's views represent the original understanding, the majority has not cited these more obviously nationalistic statements in its state sovereign immunity decisions.

The dissent's embrace (and the majority's discounting) of Federalists' nationalistic statements has not been limited to the state sovereign immunity cases. In *Garcia*, Justice Blackmun supported the Court's defense of federal power to regulate the states by citing James Wilson's observation at the Pennsylvania convention that "[a]lthough it presupposes the existence of state governments, yet this Constitution does not suppose them to be the sole power to be respected."²⁹⁵ In *United States v. Morrison*,²⁹⁶ Justice Souter cited statements by Madison, Wilson, Marshall, Hamilton, James Iredell, and Samuel Stillman to demonstrate that the founding generation understood the Constitution's structure to be the principal source of protection for state autonomy.²⁹⁷ And in *Term Limits*, Justice Stevens (for the Court) cited scores of statements by Federalists suggesting that federal representatives had a relationship to the national government (and the national polity) that was not subject to alteration by the states.²⁹⁸

293. See *Seminole Tribe*, 517 U.S. at 156 (Souter, J., dissenting); *Welch*, 483 U.S. at 501, 506 n.13 (Brennan, J., dissenting).

294. See *Seminole Tribe*, 517 U.S. at 138 (Souter, J., dissenting) (noting that Marshall believed "that ratification would not itself entail a general reception of the common law of England"); *id.* at 139 (noting Madison's argument that the common law varied too much from state to state to be imported uniformly into the Constitution); *id.* at 151 n.45 (noting that Hamilton, in *The Federalist* No. 22, and Madison, in *The Federalist* No. 49, argued that sovereignty rested only in the people, who could withhold any power they wanted from any level of government); *id.* at 152 (citing Hamilton's later, consistent view of national power when discussing the National Bank); see also *id.* at 152–53 (citing Marshall's and James Iredell's views on the Court); *id.* at 155 (citing Madison's view, at the Philadelphia convention and in a letter to Thomas Jefferson, that unjust state laws were among the prime factors requiring a new, more powerful central government).

295. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985) (quoting 2 DEBATES, *supra* note 208, at 439).

296. 529 U.S. 598 (2000).

297. See *id.* at 647–48 & n.17 (Souter, J., dissenting).

298. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793 (1995) (noting that Hamilton argued at the New York convention that "the people should choose whom they please to govern them"); *id.* at 794–95, 819–22 & n.30 (citing THE FEDERALIST NOS. 52, 57 (James

When it has not discounted the nationalistic views cited by the dissent—we have already seen how Justice Scalia (for the majority in *Printz*) responded to a nationalistic reading of Hamilton's views²⁹⁹—the majority has generally read such statements narrowly in order to be more consistent with other, more federalistic statements. Consider the disagreement over whether Congress has authority to direct the states to address particular problems of national concern or to enforce a federal regulatory program. In holding that it does not,³⁰⁰ the Court has relied on the founding-era consensus (established after the rejection of the New Jersey Plan) that the national government would have direct regulatory power over individuals. Specifically, the Court has cited statements by Madison and Randolph at the Philadelphia convention supporting the Virginia Plan on the grounds that it would avoid the principal defect of the Articles of Confederation, which required Congress to act through the states as intermediaries;³⁰¹ statements by Madison and Hamilton in *The Federalist* that people, not states, were the only proper objects of government;³⁰² and statements to the same effect by various Federalists at the state conventions.³⁰³

Madison) and 36 (Alexander Hamilton), and the comments of James Wilson, Carey Nicholas, Robert Livingston, John Stevens, Timothy Pickering, John Dickinson, and Noah Webster for the same proposition); *id.* at 806–09 (citing THE FEDERALIST NOS. 52, 57 (James Madison) and 59 (Alexander Hamilton), and the comments of Madison and Gouverneur Morris at the Philadelphia convention, for the proposition that states would have no role in setting qualifications for federal representatives); *id.* at 809–10 (noting that Madison, Nathaniel Gorham, Randolph, Rufus King, and Hamilton agreed at the Philadelphia convention that states should not have power to set federal representatives' salaries); *id.* at 813–14 (noting that Livingston and Hamilton argued at the New York convention “that rotation was incompatible with the people's right to choose”); *id.* at 821–22 (citing THE FEDERALIST NO. 15 (Alexander Hamilton), and the comments of G. Morris, George Read, and James Wilson at the Philadelphia convention, for proposition that the federal government is directly responsible to the people, and chosen by the people, not the states).

299. See *supra* notes 1–11 and accompanying text; cf. *Term Limits*, 514 U.S. at 856–57 (Thomas, J., dissenting) (discounting views of Justice Story because Story's positions were “more nationalist than the Constitution warrants”).

300. See *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress cannot compel states to administer or enforce a federal regulatory program); *New York v. United States*, 505 U.S. 144 (1992) (holding that Congress cannot compel states to legislate in accordance with federal directives).

301. *Alden v. Maine*, 527 U.S. 706, 714 (1999) (citing Madison's comments at the Philadelphia convention); *Printz*, 521 U.S. at 919–20 (same); *New York*, 505 U.S. at 164 (citing Randolph's and Madison's comments at the Philadelphia convention); *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 793 n.31 (1982) (O'Connor, J., concurring in part and dissenting in part) (citing Randolph's comments at the Philadelphia convention).

302. See *Alden*, 527 U.S. at 714 (citing THE FEDERALIST NOS. 15 (Alexander Hamilton) and 20 (James Madison and Alexander Hamilton)); *Printz*, 521 U.S. at 919–20 (quoting THE FEDERALIST NO. 15 (Alexander Hamilton)); *New York*, 505 U.S. at 163, 180 (quoting THE FEDERALIST NOS. 15, 16 (Alexander Hamilton), 42 (James Madison), and 20 (Alexander

The majority and the dissent agree (as they must, in light of fairly clear history) that the framers' decision to give Congress authority to regulate individuals directly was a response to one of the most significant failings of the Articles of Confederation, which left the implementation of federal law solely to the good faith of the states.³⁰⁴ In this respect, the Federalist statements noted above were nationalistic; Randolph, Madison, and the others strongly believed that the national government needed more power to be effective. The debate, then, is over the implication of this nationalistic argument. The majority has read the statements according to the principle of *expressio unius*, and reasoned that the national government's new power to regulate individuals directly implied that it would thereafter lack the power (which it enjoyed under the Articles) to regulate by using the states as intermediaries.³⁰⁵ The dissent has cited the same statements as evidence that the founding generation understood the Constitution to confer upon Congress a new *and additional* power.³⁰⁶ The dissent, in other words, cited these nationalistic statements to imply nationalistic consequences, whereas the majority cited them to imply decidedly federalistic consequences.³⁰⁷

Hamilton and James Madison)); *Fed. Energy Regulatory Comm'n*, 456 U.S. at 792–93 (O'Connor, J., dissenting) (citing THE FEDERALIST NOS. 15 and 16 (Alexander Hamilton)).

303. *New York*, 505 U.S. at 165–66 (citing Oliver Ellsworth at the Connecticut convention; Charles Pinckney at the South Carolina convention; Rufus King at the Massachusetts convention; Hamilton at the New York convention; and Samuel Spencer at the North Carolina convention for the proposition that Congress must have power to regulate individuals directly, without having to rely on the states for implementation or enforcement); *Fed. Energy Regulatory Comm'n*, 456 U.S. at 792 (O'Connor, J., dissenting) (citing Charles Pinckney at the South Carolina convention).

304. See *supra* notes 95–106 and accompanying text.

305. See *New York*, 505 U.S. at 166 (“In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.”).

306. See *Alden*, 527 U.S. at 809 n.39 (Souter, J., dissenting) (arguing that the majority misunderstands THE FEDERALIST NO. 15 (Alexander Hamilton)); *Printz*, 521 U.S. at 945 (Stevens, J., dissenting) (citing THE FEDERALIST NOS. 15 and 27 (Alexander Hamilton) to demonstrate the original understanding that the Constitution *extended* the power of federal government beyond that which it enjoyed under the Articles).

307. The majority followed the same pattern in Justice Thomas's dissent (joined by Chief Justice Rehnquist and Justices O'Connor and Scalia) in *Term Limits*. Justice Thomas read several statements suggesting that there were few requirements for federal officeholders to imply a floor (permitting states to add more requirements) rather than a ceiling (preventing the states from setting additional qualifications for federal representatives). See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 860–61 (1995) (Thomas, J., dissenting) (citing Madison's comments at the Philadelphia convention and the Virginia convention); *id.* at 863 & n.10 (citing John Jay at the New York convention, Caleb Strong at the Massachusetts convention, Anthony Wayne at the Pennsylvania convention, and THE FEDERALIST NO. 59 (Alexander Hamilton)); *id.* at 880 & n.17 (citing THE FEDERALIST NO. 52 (James Madison) and the comments of Noah Webster and

There have been instances in which the Justices of the majority have cited Federalists' nationalistic statements as evidence of the original meaning,³⁰⁸ but in such instances the majority has generally cited these statements to support uncontroversial assertions about the scope of national authority as a preface to a discussion of the *limitations* on that authority.³⁰⁹ Arguably, then, the quantitative results of the study overstate the frequency with which the majority cites nationalistic statements as evidence of the original understanding.³¹⁰

John Stevens, Jr.); *id.* at 885 n.18 (citing Madison at the Philadelphia convention and THE FEDERALIST NO. 60 (Alexander Hamilton)); *id.* at 894–95 (citing George Nicholas at the Virginia convention and Thomas McKean at the Pennsylvania convention); *id.* at 898 n.22 (citing THE FEDERALIST NO. 52 (James Madison)). Similarly, Justice Thomas in his *Lopez* concurrence cited nationalistic statements to imply decidedly federalistic consequences. See *United States v. Lopez*, 514 U.S. 549, 590–91 (1995) (Thomas, J., concurring) (citing OLIVER ELLSWORTH, A LANDHOLDER NO. 1, CONNECTICUT COURANT (Nov. 5, 1787), reprinted in 3 DOCUMENTARY HISTORY, *supra* note 149, at 399; THE FEDERALIST NO. 35 (Alexander Hamilton); A JERSEYMAN: TO THE CITIZENS OF NEW JERSEY, TRENTON MERCURY (Nov. 6, 1787), reprinted in 3 DOCUMENTARY HISTORY, *supra* note 149, at 147; WILLIAM DAVIE, COMMENTS AT NORTH CAROLINA CONVENTION, 4 DEBATES, *supra* note 208, at 20, which argued in favor of a new power in Congress to regulate commerce, to suggest that the original understanding of commerce was limited to trade); *id.* at 592 (citing THE FEDERALIST NOS. 42 (James Madison) and 24 (Alexander Hamilton), which argued that the national government should have power over bankruptcy and to create a navy, to demonstrate that the conferral of those powers, which were related to commerce, means that the founding generation understood the commerce power much more narrowly than the Court's precedents suggest).

308. See *Term Limits*, 514 U.S. at 839, 841 (Kennedy, J., concurring) (citing THE FEDERALIST NOS. 2 (John Jay) and 39 (James Madison) for the proposition that the United States is one nation under republican principles). Justice Kennedy joined the four regular federalism dissenters in *Term Limits* to embrace a more nationalistic view of the original understanding.

309. See *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 271 (1997) (opinion of Kennedy, J.) (citing THE FEDERALIST NO. 80 (Alexander Hamilton) to argue that federal guarantees must be enforceable in court but concluding that because a state forum is available, federal courts need not entertain quiet-title action against Idaho); *Lopez*, 514 U.S. at 577–78 (Kennedy, J., concurring) (acknowledging that in THE FEDERALIST NO. 46, Madison argued that the line between state and federal authority is largely “political” and in the first instance in the discretion of Congress, but concluding that the line must be drawn by the Court, not Congress); *New York*, 505 U.S. at 158–61, 163 (citing THE FEDERALIST NO. 42 (James Madison) to demonstrate the conventional understanding that the principal defect under the Articles of Confederation was the inability of the national government to regulate interstate commerce, and thus that Congress has broad power under the Constitution to regulate commerce, but concluding that Congress cannot use commerce power to commandeer state legislative processes); *Garcia*, 469 U.S. at 572 (Powell, J., dissenting) (citing THE FEDERALIST NOS. 7, 11, 22 (Alexander Hamilton) and NOS. 42 and 45 (James Madison) to demonstrate the understanding that the national government can regulate interstate commerce because states lack the practical capability to regulate across state lines, but arguing that Congress cannot regulate the states *qua* states pursuant to the commerce power).

310. On the other hand, the quantitative results arguably skew in the other direction. As discussed above, see *supra* note 183, I have not included cases in which the voting breakdown differs markedly from the conventional divide in federalism cases. In some of those cases, however, members of the conventional federalism majority relied on more obviously nationalistic views. For example, in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994),

IV. THE IMPLICATIONS FOR ORIGINALISM

What are the consequences for originalism of the majority's and the dissent's reliance on strikingly divergent founding-era views? The results of the study suggest that one of the principal justifications for originalism—that it will constrain the ability of judges to impose their own views in the course of decisionmaking—might not be accurate as a descriptive matter. The study buttresses some of the most common criticisms of originalism—in particular, that originalism ultimately is indeterminate, and that (as a corollary) judges, facing a difficult (if not impossible) historical inquiry, might be tempted to slant the history to serve instrumentalist goals.

Recall the conventional justifications for originalism. The social-contractarian defense holds that “judges may displace legislative decisions in the name of the Constitution, but *only* because the Constitution is a social contract to which consent was validly given through ratification.”³¹¹ The principal criticism of the social-contractarian defense of originalism is unabashedly nonoriginalist; critics contend that the social contract of 1789 (or later, with respect to amendments) is simply “out-of-date” with respect to some questions and inappropriate as a governing charter for a profoundly different society and political culture.³¹²

The judicial constraint defense of originalism posits that only originalist methodology effectively limits the ability of unelected judges to impose their own views under the guise of constitutional interpretation.³¹³ Stated simply, if constitutional meaning is fixed by an understanding ascertainable by conventional historiographic methods—in contrast to an approach under which constitutional meaning is subject to evolving, extratextual norms—unelected judges cannot impose their own views under

Justice Kennedy's opinion for the Court cited Hamilton's and Madison's concerns about local economic protectionism as a justification for limiting state authority under the dormant commerce clause. Justices Stevens, Scalia, Thomas, and Ginsburg joined Justice Kennedy's opinion; Justice O'Connor concurred separately in the judgment; and Justice Souter dissented, joined by Chief Justice Rehnquist and Justice Blackmun. It is difficult to draw conclusions about the citation tendencies of the competing federalism blocs from a decision that divided the Court in such an unconventional way. See also *United States v. IBM*, 517 U.S. 843, 859–60 (1996) (opinion of Justice Thomas, joined by Rehnquist, C.J., and O'Connor, Scalia, Souter, and Breyer, JJ.) (citing comments of framers at Philadelphia convention to demonstrate that Export Clause, U.S. CONST. art. I, § 9, cl. 5, prohibits federal tax on goods in export transit); *id.* at 873–74 (Kennedy, J., dissenting, joined by Ginsburg, J.) (citing comments from Philadelphia convention to support opposite conclusion).

311. Dorf, *supra* note 49, at 1766.

312. See, e.g., Brest, *supra* note 58, at 230; Farber, *supra* note 67, at 1095; Munzer & Nickel, *supra* note 59, at 1032; Grey, *supra* note 70, at 710–14.

313. See Scalia, *supra* note 13, at 45.

the guise of constitutional interpretation.³¹⁴ The most frequent response by critics of originalism is methodological. Because the historical materials are often “incomplete, inaccurate, or conflicting,” even when the materials inspire confidence—putting aside whether judges have the ability to engage in serious historical inquiry—they rarely contain clear evidence of an understanding of the particular constitutional question before the court. Faced with these indeterminacies, judges might be tempted—either consciously or subconsciously—to read the history in a manner that advances their own preferences.

The study does not directly undermine the social-contractarian defense, or provide much traction to the particular attack that critics have leveled against it. If the Constitution is not a social contract—or if it is, but should be interpreted differently than conventional contracts—then originalism itself is misguided, and the difference between voices cited by the majority and the dissent would be beside the point. But if the Constitution ought to be viewed as a social contract—and even most “moderate originalists”³¹⁵ and nonoriginalists accept as much by conceding that the very concept of a Constitution means that attention to original meaning must play *some* role in constitutional interpretation³¹⁶—then the fact that judges disagree about the meaning of its ambiguous text does not distinguish it from most contracts, which suffer from the inevitable interpretive difficulty that arises from the diversity of human understanding. This is not to say that the study has no implications for this defense of originalism. On the contrary, however sound the social-contractarian defense may be in theory, the profound disagreement over what precisely was embraced by the constitutional “meeting of the minds” suggests that the defense has not fared well in the translation from theory to practice.

The study has more important implications for the judicial-constraint defense. It suggests that the defense is overstated, and it provides a descriptive basis for criticisms of the defense. The substantial difference between the historical voices upon which the current majority and dissent rely in establishing original meaning suggests that the original meaning is elusive and that originalism has not effectively constrained the ability of

314. See *id.* at 41–47; BORK, *supra* note 34, at 163; Scalia, *supra* note 24, at 863. See generally BERGER, *supra* note 37.

315. Brest, *supra* note 58, at 205.

316. See, e.g., Dorf, *supra* note 49, at 1766; Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL’Y 311, 313 (1996); Dworkin, *Comment*, in A MATTER OF INTERPRETATION, *supra* note 13, at 115–17.

the Justices to decide federalism cases based on their own (albeit genuinely held) normative views of the appropriate balance of federal and state authority.

The difference in citation patterns revealed by the study may simply be a product of the same difficulties that inhere in any historical inquiry. It may well be that either the majority or the dissent has correctly discerned the original understanding, and that the remedy for the differences revealed by the study is simply better persuasion. Perhaps the results of the study do not suggest any defect in originalism other than the one that originalism's staunchest proponents readily concede: that "two judges equally devoted to the original purpose may disagree about the reach or application of the principle at stake and so arrive at different results."³¹⁷ As originalists are quick to point out, this difficulty "in no way distinguishes the task from the difficulties of applying any other legal writing."³¹⁸

I propose that the study suggests something more than a simple disagreement in federalism cases about the "reach or application of the principle at stake." The majority and the dissent disagree on the principle itself, yet both sides draw support from the same historical record for their sharply conflicting views. It is for this reason that the study suggests a more fundamental problem for originalism; indeed, the study supports the argument that originalism's very historicism is its most significant defect.

Historians have argued that the nature of the ratification—a debate between competing factions that produced an ambiguous document susceptible to several equally plausible but conflicting interpretations—makes ascertainment of a meta-understanding elusive, if not impossible. As Professor Rakove has explained:

Both the framing of the Constitution in 1787 and its ratification by the states involved processes of collective decision-making whose outcomes necessarily reflected a bewildering array of intentions and expectations, hopes and fears, genuine compromises and agreements to disagree. The discussions of both stages of this process consisted largely of highly problematic predictions of the consequences of particular decisions. In this context, it is not immediately apparent how the historian goes about divining the true intentions or understandings of the roughly two thousand actors who served in the

317. BORK, *supra* note 34, at 163; accord Scalia, *supra* note 13, at 45 ("There is plenty of room for disagreement as to what original meaning was, and even more as to how that original meaning applies to the situation before the court.").

318. BORK, *supra* note 34, at 163.

various conventions that framed and ratified the Constitution, much less the larger electorate they claimed to represent.³¹⁹

Originalism, like any historical inquiry, can shed light on the competing views and interests at stake in the creation of the Constitution; but originalism's objective—to extrapolate from the views of a few individuals (important as they were to the project of constitutionalism) a broader, fixed meta-understanding—distinguishes it from the general objective of the historian, and ignores the limits of historical inquiry.³²⁰

It should come as no surprise, then, that well-meaning originalist judges can use the historical record to substantiate sharply conflicting views of the original understanding. The original understanding is by its very nature elusive; we cannot expect more of judges than we do of historians. The stark difference with respect to citation patterns between the majority and the dissent simply confirms what historians have long known: that the quest for original understanding will rarely result in entirely satisfactory (or conclusive) answers. Under this account, the study confirms that history—especially the history of an event that was so contentious in its day—is rarely susceptible to one interpretation.

The study is also consistent with a significantly more damaging criticism of originalism. The stark—and consistent—difference between the founding-era views cited by the majority and the dissent as evidence of the original understanding suggests that one of originalism's principal justifications—the judicial-constraint defense—is illusory. The fact that the historical record is susceptible to such conflicting interpretations means that there is significant room for judges to slant the historical record to serve instrumentalist goals. I do not mean to suggest here that the Justices in the majority or the dissent have *in fact* manipulated the historical record to support their personal views of the appropriate balance between federal and state power, although others have leveled that charge.³²¹ The results of

319. RAKOVE, *supra* note 32, at 6.

320. As Daniel Farber has explained:

[it is] somewhat unrealistic to posit a single original understanding. For example, Madison took a notoriously short time to discover that his understanding of the text was rather different from that of his fellow delegates Hamilton and Washington. It might be more accurate, therefore, to speak of the range of original understandings that the text was capable of supporting in its historical context.

Farber, *supra* note 204, at 646–47; see also *id.* at 647 (suggesting “a more self-conscious selection of sources that is keyed to our normative theory of constitutional interpretation”; “If our normative theory requires us to determine the general understanding of the text, we are particularly in need of reliable evidence of widely shared understandings, as opposed to the viewpoints of a few individuals at a particular time.”).

321. See Kelly, *supra* note 61, at 119; Nowak, *supra* note 25, at 1094.

the study need only be *consistent* with such an account to undermine the judicial-constraint defense of originalism.

No constitutional interpretive methodology is immune from instrumentalist manipulation, and originalism at least has other compelling justifications to commend it. But the study is particularly damaging to originalist claims *precisely because* of originalists' frequent insistence that originalism is largely immune from judicial manipulation. Originalist critiques have forced proponents of competing methodologies to address candidly the problem of judicial instrumentalism, and to justify their approaches *notwithstanding* that obvious risk.³²² The appeal of originalism, in contrast, has long been its seeming immunity from charges of judicial activism, and originalism's most prominent proponents have framed their defenses of it to underscore this point.³²³ If originalism as actually employed by judges is as demonstrably susceptible to judges' imposing their own views under the guise of constitutional interpretation, then originalists' critiques of other approaches to interpretation seem hollow.

Justice Scalia might be correct in asserting that "the originalist at least knows what he is looking for: the original meaning of the text,"³²⁴ and he may even be correct that originalism "cater[s]" less to judicial "willfulness" than do nonoriginalist methods of interpretation.³²⁵ But the results of the study suggest not only that the originalist's object is illusory, but also that originalism's advantage over other approaches to constitutional interpretation with respect to its ability to constrain judicial discretion is marginal. Whatever one may say of Justice Scalia's fidelity to originalism, the Court's opinions—both majority and dissenting—suggest that his aspirations for originalism remain unfulfilled.

What, then, is the role of originalism in constitutional interpretation? After all, even if the judicial-constraint defense of originalism is overstated, the study does nothing to undermine the social-contractarian defense of originalism. This, perhaps, is unsurprising; it is difficult to argue that the original understanding of the Constitution ought to be *irrelevant* in determining the present-day meaning of the document, and it is difficult to imagine how the Court's actual deployment of originalism could undermine this basic proposition. Indeed, if the current meaning of a provision of the

322. See, e.g., 1 *TRIBE*, *supra* note 189, at 24–29.

323. See *BORK*, *supra* note 34, at 251–52; Scalia, *supra* note 13, at 45–46.

324. Scalia, *supra* note 13, at 45. Justice Scalia even has acknowledged that originalism cannot completely "inoculate[] against willfulness"; but he finds originalism preferable because "unlike aspirationism[,] it does not cater to it." Scalia, *supra* note 57, at 140.

325. Scalia, *supra* note 57, at 140.

Constitution need not bear *any* relationship to what it meant when it was adopted, then what is the point of having a Constitution at all?³²⁶

The challenge of constitutional interpretive methodology, then, is to accommodate the obvious virtue of originalism—its insistence that the very nature of a Constitution as higher law requires fidelity to its constitutive meaning—while avoiding its (now apparent) defects. The study reveals that originalism is better at answering some questions of constitutional law than others. Originalism is least controversial—and is most likely to preserve fidelity to the social-contractarian theory of the Constitution while thwarting judicial instrumentalism—when applied to answer questions at a high level of generality. Conversely, originalism creates significant potential for judges to impose their own views under the guise of historical inquiry when judges apply it to answer questions on a specific level of generality.

This is unsurprising, in light of the nature of the framing and ratification of the Constitution. The Constitution's text and the historical record are more likely to produce an uncontroversial answer to questions posed at a high level of generality; when questions are posed at a high level of specificity, both the text and the historical record are likely to be either silent or susceptible to competing interpretations. Consider, for example, the question raised in *United States v. Lopez*, which addressed a challenge to a congressional attempt to criminalize the possession of guns within 1000 feet of a school.³²⁷ Reference to the original understanding is of limited utility in answering whether Congress enjoys such a power, both because the nature of commerce has changed radically in the two centuries since ratification, and because the views expressed during the Convention and the ratification debates obviously do not address the specific question. But originalism at least can answer an extremely relevant question phrased at a higher level of generality: Both the constitutional text and the debates over its drafting and ratification reveal consensus that the powers of the federal government are not limitless.

The Court could have decided *Lopez* by asking whether recognition of the congressional authority asserted in the challenged statute would effectively have rendered meaningless the one limit that originalist methodology could clearly identify: If Congress can rely on the commerce power to regulate the localized possession of guns without reference to a nexus to interstate commerce, what can Congress *not* regulate pursuant to

326. See McConnell, *supra* note 47, at 1128–32.

327. 514 U.S. 549 (1995).

the commerce power? The Court cannot provide a coherent answer to that question, however, without reference to some *other* theory about the value of federalism.³²⁸ Late-nineteenth century and early-twentieth century attempts to answer the question lacked such a normative theory, and were ultimately unpersuasive because they were unduly formalistic and seemingly arbitrary.³²⁹ If after reference to a normative theory of federalism there is no satisfactory answer to the question—and many commentators have noted that Justice Breyer's dissent in *Lopez* failed to suggest an answer—then the Court is fully justified in invalidating the statute on federalism grounds.

To take another example, we might say with some confidence that the first clause of Article I, section 8³³⁰ was originally understood to permit Congress to spend money to achieve objectives beyond those enumerated in the other clauses of section 8;³³¹ we would be hard-pressed, however, to discern whether Congress was originally understood to enjoy the authority to threaten to withhold all federal funds from a state that fails to comply with one particular regulation in a federal spending program designed to advance education of children with special needs.³³² Because the founding generation could not have foreseen the more specific question, reference to their understanding is unproductive,³³³ and the Court must apply some other normative theory of the Constitution to answer the question.

Originalism is most useful in providing general principles of constitutional law, but its utility in answering particularized questions—questions for which there was no discernable original understanding—is far more limited. Preserving the fiction that originalism not only can provide an answer to those questions, but also that it can do so while avoiding judicial instrumentalism, stunts inquiry into other, equally defensible

328. One such theory appears in Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987).

329. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941).

330. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .").

331. See *United States v. Butler*, 297 U.S. 1, 65–67 (1936) (accepting Hamiltonian view over Madisonian view).

332. See *Virginia Dep't of Educ. v. Riley*, 106 F.3d 559 (4th Cir. 1997).

333. See ELY, *supra* note 45, at 1–2.

What distinguishes interpretivism from its opposite is its insistence that the work of the political branches is to be invalidated only in *accord* with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution. That the complete inference will not be found there—because the situation is not likely to have been foreseen—is generally common ground.
Id. (emphasis added).

methods of constitutional interpretation. It is beyond the scope of this Article to suggest what other methodology should fill the gap that originalism leaves—or provide the coherent, detailed, and workable theory of federalism that the historical record does not—but the study described here demonstrates at a minimum that originalism is not the panacea that its proponents claim it to be.

CONCLUSION

In “What the Anti-Federalists Were For,” his essay introducing *The Complete Anti-Federalist*, Herbert Storing lamented that although the Anti-Federalists are entitled “to be counted among the Founding Fathers,” albeit in the “admittedly . . . paradoxical sense” of opponents of the Constitution who played a “subordinate part in the founding process,” in general “they have not enjoyed such a position.”³³⁴ Professor Storing likely would have been heartened by Justice Thomas’s understated observation in 1997 that “our ready access to, as well as our appreciation of, such documents [including *The Complete Anti-Federalist*] has increased over time.”³³⁵ From the results of the study presented in this Article, one can indeed discern appreciation on the Court for Anti-Federalist views, just as one can find appreciation for the views that the Anti-Federalists most feared. But appreciation for the range of views—at least when measured by frequency of citation as evidence of the original understanding—does not appear to be shared evenly by the Justices of the majority and the dissent.

Ironically, it is only now, with both sides in the federalism debate so firmly in the originalist camp, that the shortcomings of originalism are more apparent and that the deployment of originalism in practice may have undermined the propriety of originalism in theory. Both the well-meaning originalist and the cynical originalist for whom the methodology is a convenient cover for instrumentalist decisionmaking can find among the vast body of primary historical materials statements that support a spectrum of constitutional meaning. Historians have long reveled in the richness and diversity of the views that vied for dominance in the founding era, but it is such diversity of views that makes the quest for determinate meaning seem illusory and ultimately unsatisfying.

334. STORING, *supra* note 89, at 3.

335. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 633 n.17 (1997) (Thomas, J., dissenting).